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United States Court of Appeals

FOR THE SECOND CIRCUIT.

Civil Action No. 72-258.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant.

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE.

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FARRELL LINES, Incorporated,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

Statement.

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York setting aside a jury verdict in favor of the plaintiff and directing judgment for the defendant under Rule 50(b) of the Federal Rules of Civil Procedure.

This action was brought to recover damages for the death of James W. Miller on November 15, 1950, while employed as an Assistant Electrician aboard the SS. *African Glade*, owned by the defendant. The complaint, although it set up only one cause of action, actually contained what will be referred to as two separate counts:

1. A violation of the duty to restrain or safeguard the decedent on the basis of alleged signs of mental instability

which could have reasonably led the Master to believe that he would do harm to himself.

2. A violation of the duty to rescue or to take proper and efficient means to do so after it was known that the decedent had gone overboard.

A motion was made by defendant for a directed verdict at the close of the plaintiff's case [506-536]. The Court reserved decision [548]. This motion was renewed at the close of the whole case, [793-837] on which decision was also reserved [837-838].

At the conclusion of his charge, the Court submitted two questions to the jury and also requested that the jury bring in a verdict for the plaintiff or the defendant.[1]

In the brief for Plaintiff Appellant, it was incorrectly stated that the questions submitted to the jury were agreed to by counsel for both parties. The colloquy between the

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[1] The Court: Now, Court's Exhibit 3 consists of two questions and a form of verdict.

The first question is this:

"Did Miller's conduct aboard the S.S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

You will please answer that question yes or no.

The second question, which is in two parts, and which you should also answer yes or no, is as follows:

"Upon being notified that Miller had disappeared from the S.S. African Glade at 10:20 A.M. on November 15, 1950:

"(a) Was James W. Miller alive at that time?

"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?

"Third: In addition to answering the above questions, please report your verdict as follows:

"For defendant or For plaintiff,"

and then in the event the verdict is for the plaintiff there are three subdivisions and your verdict may be divided into any one or all of those three subdivisions as you see fit.

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller.

"(b) Amount, if any, awarded for the pecuniary loss to the widow.

"(c) Amount, if any, awarded for the pecuniary loss to the child."

I hand this to the foreman of the jury and the marshals may now be sworn and the jury retire.

counsel for the plaintiff and the Court demonstrates this to be untrue.[2]

The jury answered the first question "No." The (a) part of the second question, as to whether the decedent was alive at 10:20 a. m. on November 15, 1950, was answered "Yes" and the (b) part, as to whether the Master had taken all proper and efficient means to effect a rescue, was answered "No." The jury gave an award of $10,000 to the widow and $45,000 to the child.

As soon as the jury was discharged, counsel for the defendant renewed his motion for a directed verdict made at the close of the plaintiff's case and at the close of the whole case.[2]

The Court thereupon granted the motion, set aside the verdict and directed a verdict for defendant.[2]

The plaintiff-appellant, in her brief, appears to have abandoned the so-called first count which alleged a violation of the duty to restrain or safeguard the decedent on the basis of alleged signs of mental instability which should have led the Master or other crew members to believe that he might do harm to himself. On this count, the jury found against the plaintiff and in her brief the plaintiff-appellant

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[2] The Court: Or in the alternative a new trial.

Do you wish to say anything, Mr. Kaplow?

Mr. Kaplow: I just wish to say that for the record the questions proposed by the Court and consented to by both counsel clearly point up the issues of fact in this case, and that the jury deliberations clearly indicate that they did deliberate on issues of fact based upon probative evidence that was produced at this trial for them, and that in my opinion the jury verdict is based upon their determination of the facts in this case.

The Court: Well, I should like to make it clear that in consenting to the form of these questions, I don't regard Mr. Flynn as having waived any of the motions that he made and pressed.

Mr. Kaplow: No, I didn't intend that, your Honor.

The Court: He pressed his motions at the close of your case; he pressed his motions at the close of the entire case. I reserved decision on both occasions, and I think there is a very, very serious question of the legal propriety of the verdict in this case.

I feel that there is no proper basis for the establishment of any causal relationship between the alleged negligent search and the death of the decedent.

I think that the interests of time and convenience made it wise and prudent to permit the jury to return a verdict.

I feel, however, that my duty is very clear and that I should grant the motion and accordingly I grant the motion to set aside the jury verdict and direct a verdict for the defendant.

Mr. Kaplow: I respectfully except.

does not request that this be reviewed but, on the contrary, asks for a reinstatement of the jury's verdict. Consequently, no reference will be made by defendant-appellant to the so-called first count.

Questions Presented.

1. Whether, if negligence was proved, there was proof that such negligence caused the decedent's death, and

2. Whether there was adequate proof of the defendant's negligence.

Facts.

The facts as testified to at the trial are not in dispute. The plaintiff read into the record the testimony of Captain Wilder [74-130], whose deposition had been taken by the defendant. Chief Electrician Levy, who had been produced in Court by defendant was called as a witness by plaintiff. Chief Steward Aiken and Captain Ware testified for the defendant. The plaintiff called no factual witnesses. The widow of the decedent, who knew nothing of the facts, and Captain Fienne, who testified as an expert, were called by the plaintiff. The defendant called Captain Sheridan and Captain Umstead as expert witnesses.

The decedent, James W. Miller, signed articles as Assistant Electrician on the SS. *African Glade* on November 10, 1950, at New York [88] [112a]. The ship sailed the same day, bound for Dakar, West Africa. The vessel took departure from Ambrose on a true course by gyro of 106° true [97] [612] [112a].

The day the ship sailed was a Friday and the time of sailing was the early evening. The decedent shared a forecastle with Chief Electrician Levy, who was his immediate superior [153-154]. He had not previously sailed on this vessel and as far as is known, did not know any of the other crew members.

The decedent was a quiet man and did not become acquainted with other members of the crew, other than Chief Electrician Levy, his superior and roommate [230]. When he first reported aboard, he met Chief Steward Aiken, who issued him bed linen [558]. Aiken occupied the room opposite to that shared by the decedent and Levy [559].

As the decedent was a day worker, he did not work Saturday or Sunday. The decedent worked, Monday and Tuesday, November 13th and 14th, and performed his duties satisfactorily [181-182, 227-229].

The witness Levy testified that on Sunday night, seeing that the decedent was very quiet, opened a bottle of liquor and took a drink and asked the decedent where he was from and, when told Scotland, called in another Scotch member of the crew and left them saying, "Help yourself," and went into the mess hall [192].

At about 6 o'clock on the evening of November 14, 1950, the Chief Electrician entered their forecastle and found the decedent seated on the settee, smoking a cigarette and reading a book. The Chief Electrician remained in the forecastle for about one-half hour and during that time the two men conversed in a very normal manner. The only thing that appeared slightly unusual to the Chief Electrician was that the decedent was smoking, since he had previously stated that he had given up smoking. When queried about this by the Chief Electrician, he replied that he had not given up the habit but was borrowing cigarettes until he had a chance to buy some from the ship's stores. At about 6:30 the Chief Electrician left Miller in the room and went to the messroom to play cards [229-232, 279].

The Disappearance.

At about 11:30 p. m., November 14, 1950, the Chief Steward, Leopold Aiken, went out on the afterdeck on the starboard side and noticed the decedent pacing the deck. The Chief Steward noticed nothing unusual about the decedent, except that he had his head down and appeared

deep in thought. This was the last time that Miller was seen aboard the vessel [570-573, 575-576].

The Chief Electrician got up at 7:30 a. m., November 15, 1950, and noticed that Miller's bunk had not been slept in, but, at the time, he did not think it strange since it had not been used the prior night. At 8 o'clock the Chief Electrician turned to and, although he did not see Miller, he did not become concerned since he assumed he was working elsewhere. At about 9 o'clock the Chief Electrician began to look for Miller so that he could assist him on a job, but he failed to locate him. When Miller failed to appear at coffee time, at 10 o'clock, the Chief Electrician, after inquiring of his whereabouts from the other crew members, reported him missing to the Master at 10:20 a. m. [102-103, 273-274, 276-281].

The Search.

The Master was notified at 10:20 a. m. on November 15, 1950, that Miller was missing. He immediately called all department heads and had a search made of the vessel [77-79, 89].

At 10:30, the ship made a 270° turn and headed her bow back into her wake on a reciprocal course of 298° true by gyro. The ship had been on a course of 118° true by gyro from noon on November 14th [79-81, 89, 107].

The Master communicated with the U. S. Coast Guard Weather Ship in the vicinity and radioed the home office [79].

The Master had lookouts posted about the ship during the search. The search continued until 5:16 p. m. until darkness set in when the ship resumed her original course of 118° true by gyro [87, 111].

The Issue as to the Search.

There is no dispute as to the facts regarding the search. The testimony offered by the plaintiff all came from the mouths of the defendant's witnesses.

The issue is as to whether the Master on the facts as disclosed by the testimony conducted a proper search. The issue can be further narrowed by stating that, in the main, it was the contention raised by Captain Feinne that the vessel should have proceeded to a position where Miller was last known to be alive. The position of defendant-appellee is that the evidence discloses that the vessel did return on a reciprocal course and that this was the only method of search that the Master could have followed.

POINT I.

There is no probative evidence in the case to establish any causal relation between the alleged violation of the duty to take proper and efficient means to effect a rescue and the death of the decedent.

It is undisputed that there was no duty to rescue prior to 10:20 a.m. on November 15, 1950, at which time the Master was notified of the disappearance of the decedent. In the plaintiff-appellant's brief this is the time referred to when the search was commenced and no contention is made that it should have been commenced earlier. It is also undisputed that the decedent was last seen alive at 11:30 p.m. on November 14, 1950, pacing the deck, adjacent to No. 4 hatch. Although there was no proof offered as to how the decedent left the ship, the plaintiff's case was tried on the theory that by reason of mental disturbance, the decedent committed suicide. There was no testimony adduced to show that Miller was alive at 10:20 a.m. on November 15, 1950. There was no evidentiary basis upon which the jury could draw an inference that Miller was alive at 10:20 a.m. as set forth in their answer to interrogatory (a) of the second question. It must be reiterated that defendant's counsel did not consent to the jury being permitted to answer this question. This was clearly understood by the Court and also by counsel for the plaintiff, as it appears by the colloquy previously set forth in footnote #2 at page

3 of this brief. The contention of the defendant, at all times, was that there was no evidence whatsoever from which an inference could be drawn that Miller was alive at 10:20 a.m. The putting of the question to the jury, if anything, pointed up the absurdity of the proposition. It is likewise clear, and the Court so charged the jury and the plaintiff apparently does not contest in her brief that, in order for the plaintiff to recover on the basis of a negligent search, the decedent must have been alive at 10:20 a.m., November 15, 1950, when the search began. There was no evidence from which any inferences could be drawn that Miller was alive at 10:20 a.m. on November 15, 1950 and all of the possibilities point to the fact that he was not alive at that time. The evidence shows that, when last seen, Miller was pacing the deck alongside No. 4 hatch. As testified to by Captain Fienne, plaintiff's expert, if Miller went over the side at No. 4 hatch, he would have fallen a distance of 20 to 25 feet. The vessel, at the time, was proceeding at a speed of 14½ knots. The shock to a man hitting the water at this height and the speed of the vessel would be considerable. As further testified to by the expert for the plaintiff, going overboard just aft of the midship house, which is at No. 4 hatch, a man would most likely be drawn by the suction created by the forward movement of the ship into the propeller. At about 11:30 p.m. on November 14th, when Miller was last seen alive, the weather condition was sporadic rain squalls and a moderate southerly sea. Taking these conditions, together with the theory of plaintiff's case, that Miller went over the side with the intention to take his own life, it is difficult to conceive that he remained afloat at all.

If this is speculation and conjecture, how much more so is the contention that Miller was alive at 10:20 a.m. the next morning. If he were already dead at 10:20 a.m., there was no obligation to do anything. There is no duty to search for the body of a dead seaman. To show any casual connection between the death of Miller and the failure to take proper and efficient steps to rescue, the plaintiff must prove that there was a life to save. This cannot be left to

speculation or conjecture. The plaintiff must prove that the alleged negligence, in not making proper and efficient rescue efforts, caused the decedent's death. If Miller was already dead, obviously, any negligence in connection with the rescue did not cause his death. The plaintiff did not prove that Miller was alive at any time subsequent to 11:30 p.m. on November 14, 1950.

The claim here is that the plaintiff-appellee did not prove that the alleged negligence was the cause of the decedent's death. We are dealing with a very fundamental concept—that no man can be held responsible for his negligence unless it caused the injury. In 33 Harvard Law Review in an article by Professor Joseph H. Beale, entitled, "The Proximate Consequences of An Act," he writes at page 637:

> "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law—and, it is believed, in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.
>
> "Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina* v. *Dalloway*, it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be

acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.

"This principle is illustrated by several recent cases. In *Piqua* v. *Morris*, the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford* v. *Trident Fisheries Co.* where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved."

The defendant does not question that a Master of a ship must take all reasonable steps necessary to rescue a seaman who has been lost overboard.

In the leading case on this subject, *Harris* v. *Pennsylvania Railroad Co.*, 50 F. 2d 866, the following rule was laid down:

"* * * But we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable *if, by failure to perform this duty, his life is lost* (italics ours).

The question of causal relation was discussed in *Kirincich* v. *Standard Dredging Co.*, 112 F. 2d 163. In that case, the decedent and two other deck hands were on a barge which was approaching a pier. The decedent fell into the water in a manner not disclosed and called out for help. The other deck hands threw heaving lines which fell short of reaching the decedent by two feet. The decedent

was carried out by the tide and disappeared with a cry of, "Goodby fellows."

The Court in its opinion discussed the article of Professor Beale in 33 Harvard Law Review and then asked the question:

> "In the light, then, of this logic and these examples, would Kirincich have drowned even if a larger and more buoyant object than the inch heaving line had been thrown within two feet of him?"

It answers this question in the affirmative. The Court held there was "causation" of which there semed to be ample proof.

In *Hutchinson* v. *Dickie*, 162 F. 2d 103, the decedent fell from a cabin cruiser while on a pleasure cruise on Lake Erie. It does not appear how the decedent came to fall into the water. The Court below found that the owner of the yacht was negligent in backing the boat instead of turning her about. The Court of Appeals reversed and said in part.

> "Further, we think an unsurmountable objection to the judgment in appellee's favor is the entire lack of evidence that anything appellant did or left undone caused his efforts at rescue to fail. It does not appear that if appellant had turned the cruiser instead of backing it, Dickie would or should have been saved. *Ford* v. *Trident Fisheries Co.*, 232 Mass. 400, 402, 122 N. E. 389."

These two cases illustrate that the plaintiff must prove that negligence in the rescue must have caused the death of the plaintiff and that, if the plaintiff would have drowned anyway, there is no liability.

In the case at bar, there is no evidence, oral or documentary, that anything that the Master of the ship did or did not do "caused his efforts at rescue to fail." The only witness for the plaintiff to testify regarding the rescue was Captain Feinne. He testified as to the propriety of the search methods used, as an expert, but gave no testimony that, even if the search had been conducted properly, the decedent might have been rescued.

In the cases of *Kirincich* v. *Standard Dredging, supra,* and *Hutchinson* v. *Dickie, supra,* the men to be rescued were known to be alive in the water and therefore there was some basis for arguing that, if the rescue efforts had been conducted properly they might have been rescued and, consequently, that the negligence caused their deaths.

In the case at bar, there is not a scintilla of evidence to support the proposition that, but for the alleged negligence in the rescue, the decedent would not have lost his life. There are no probative facts to establish that any alleged negligence in the rescue efforts caused, in whole or in part, decedent's death. The only probative fact regarding the death of the decedent is that he was seen pacing the deck at 11:30 on the night of November 14, 1950. From then on what happened is speculation and conjecture. That he died admits of no doubt because he disappeared from the vessel in the middle of the Atlantic. That he died by jumping overboard with the intent to commit suicide is the theory on which the case was tried by the plaintiff. To permit a jury to consider that any alleged negligence in the rescue efforts was the cause of the decedent's death would be more than inviting speculation and conjecture. It would be permitting the jury to bring in a verdict that would do violence to all the reasonable inferences to be drawn from the facts as known up to 11:30 p. m. on November 14, 1950. The jury would have to disregard the only reasonable supposition available to them and find that the decedent jumped overboard from a height 20 or 25 feet into a moderate sea; that he was able to get by the ship's propeller; that he suddenly had a desire to live, that he suddenly had the heart and presence of mind to avoid panic and conserve his strength to say afloat for a period of several hours at least.

We are aware of the decisions by the Supreme Court of the United States in relation to the doctrine of causal relation and proximate cause, wherein it has been held that recovery may be had if any negligent act caused the injury in whole or in part. Even under these decisions, there must be probative evidentiary facts to support a recovery. In

Lavender v. *Kurn*, 237 U. S. 645, 90 L. ed. 916, the Supreme Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This quotation appears in plaintiff-appellant's brief. This quotation, instead of supporting plaintiff-appellant's contention, is authority for the proposition that where there is a complete absence of probative facts to support the conclusion reached, the verdict cannot stand and that there must be an evidentiary basis for the jury's verdict. In the case at bar there is no evidentiary basis whatsoever from which an inference can be drawn that Miller was alive at 10:20 a.m. on November 15, 1950.

In *Schulz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, the decedent, who was employed as a tug fireman, was assigned to work on four tugboats, docked side by side at Pier "H", Jersey City. Three of the tugboats were unlighted and one was partially illuminated by spotlights from the pier. The Court below directed the verdict for defendant on the ground that the decedent might have fallen on a spot where there might have been no ice or that he might have fallen from the one boat that was partially illuminated by shore lights. The Supreme Court held that reasonable men could find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand, that

he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. The opinion of the Court reads in part as follows:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and under-manned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.
>
> "We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

In the language quoted, the Supreme Court held that the conclusions must be grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be drawn. The difficulty of applying the *Schulz* case to the case at bar arises in that in the *Schulz* case there was evidence of negligence from which an inference could be drawn, that the decedent fell from one of the unlighted tugs. There is no evidence in this case from which an inference can be drawn that Miller

was alive at 10:20 a. m. on November 15, 1950. There is also one other distinction between the *Schulz* case and the case at bar in that in the *Schulz* case it was conceded that Schulz met with an accident and did not commit suicide, whereas in the case at bar, the case was tried on the theory that the plaintiff did commit suicide and the possibility of an accident was excluded.

In *Johnson* v. *New York, N. H. & H. R. Co.*, 194 F. 2d 194, the decedent had been employed on the defendant's tug as a floatman. He met his death by drowning while the tug was removing two carfloats from a yard on the East River. There was no eyewitness to the accident and it was not known that the decedent had drowned until after the tug had completed its maneuver. There were two questions raised on the appeal.

1. Whether there was adequate proof of the defendant's negligence and

2. Whether, if negligence was proved, there was proof that such negligence caused the decedent's death. The opinion of the Court of Appeals reads in part as follows:

> "Even on the assumption that the custom existed and was violated, the judgment can be supported only if the evidence justified a finding that the violation had a causal relation to Johnson's death. When last seen alive he was walking toward the bow of float 53. It is a legitimate inference that he went ashore, crossed over to the 58 and had at least loosed the short rack line since the float was pulled out without breaking it. To get into the water he must either have fallen or jumped. Conceivably after loosening the line he may have attempted to jump to the apron of Bridge 12 in order to remain ashore until the tug should return. Capt. DeMars testified that it is not unusual on such a short maneuver for a floatman, when he lets his line go, to jump ashore. However, since Johnson's duty was to remain aboard and tie together the bows of the floats, we think it a more reasonable inference that he accidentally fell from the 58. But what caused him to fall seems to us

wholly conjectural. The plaintiff argues that the jury could infer that while he was loosening the rack line, the tug started to pull the float out before he expected, causing him to lose his footing and strike his forehead in some way that knocked him unconscious and threw him overboard. But the supposition that the tug started pulling out the float before he expected, presupposes that he did not shout the signal 'all gone.' The appellee argues that a bridgeman may have shouted 'all gone' when he released one of the long rack lines, but no witness observed any bridgeman in the neighborhood. It was Johnson's duty, not the duty of a bridgeman, to give the signal when the short rack line was free, and the assumption that some one other than Johnson gave it at that precise moment seems to us pure conjecture. It is at least equally reasonable to infer that Johnson did give the signal for the tug to start and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious. The record is a complete blank as to how or why he fell overboard. It is of course true that not always must a jury's verdict fall if it involves speculation and conjecture. As stated in Lavender *v.* Kurn, 327 U. S. 645, at page 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, when 'the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' In the case at bar we think there was a complete absence of probative facts to support the conclusion that Captain O'Brien's failure to send a man to see where Johnson was when the 'all gone' signal was heard caused his death. On the issue of causation the plaintiff had the burden of proof. In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed."

This case was appealed to the Supreme Court on a technical ground, sent back for a new trial. On a second trial, the jury again brought in a verdict, which was set

aside by the court. The Court said, in its opinion, (*Johnson* v. *Palmer,* 129 F. Supp. 202, affirmed 220 Fed. 2d 279 on the opinion of the Court below):

> "In reversing the judgment and verdict in the first trial, the Court of Appeals was of the opinion that the lack of any probative facts as to how or why Johnson fell overboard required the conclusion that the plaintiff had failed to sustain the burden of proof on the essential issue of causation. No facts were presented in this trial which would serve to remedy this lack of evidence. There is testimony that there was oil on the deck of Carfloat No. 53 near the stern. This seems to be the basis in fact for plaintiff's contention that the defendant failed to furnish the plaintiff's intestate with a safe place to work. Of course, the contention that Johnson might have slipped on this oil and fallen into the water cannot be tied in with the plaintiff's theory that Johnson might have fallen from the bow of Float No. 58, since the oil was on Float No. 53 and not Float No. 58. Furthermore, the evidence shows that Captain O'Brien saw Johnson walking forward on Float No. 53 towards the bow about half the length of the float on his way to release the short rack lines. Thus he was seen on the float beyond the place where the oil was found. In addition there is testimony by Gaglio and O'Brien, uncontradicted, that Johnson never got into the oil as he was walking forward toward the bow of Float No. 53."

The Supreme Court denied a writ of certiorari in this case on June 6, 1955. It may also be noted that the writ of certiorari was granted in the *Schulz* case on November 7, 1953 by the same Court. In the *Johnson* case, it was attempted to be proven by testimony that there was oil on the deck of *Carfloat No. 53,* which the Court held could not be tied in with the plaintiff's theory that the decedent had fallen from the bow of *Carfloat No. 58.* The Court also stated that the evidence showed that the decedent was seen walking forward on the carfloat beyond the place where the oil was found.

In the case at bar there was no evidence that, if Miller had gone over the side at 11:30 p. m., that he would have

been alive at 10:30 a. m. and moreover, no testimony was offered by the plaintiff. On the contrary, on the cross examination of Captain Feinne, plaintiff's expert, the following question and answer were given:

> "Q. Captain, there is no possibility whatsoever that Miller could have been afloat from 11:30 the night before until that time, is there? A. I don't know. I don't know and you don't know either. Nobody knows" [427].

At page 14 of the plaintiff-appellant's brief, the thought is attempted to be conveyed that the judge, at the time he submitted the case to the jury, believed that there were questions of fact to be decided by the jury and that he had a change of mind after the jury verdict came in. It is clear at the close of the whole case, the Court definitely felt that there was no proof of causation and only let the case go to the jury because of the long arduous trial and for the purpose of avoiding a new trial in the event of a reversal on appeal. The colloquy between the Court and counsel at the close of the case demonstrates this to be so [812-839] [94a, 110a].

POINT II.

All reasonable, proper and efficient means were used to effect a rescue after it was known that the decedent had disappeared.

As soon as the Master was advised at 10:20 a. m. on November 15th that Miller had disappeared, he immediately questioned those who would have reason to know about it and also ordered an immediate search by department heads of the vessel. This was done by each department head with searching parties from his department [77-79, 89]. At 10:30 a. m. he turned the ship about by making a 270° turn and headed the bow of his ship back into the wake from which the stern had just emerged and put her on a gyro course of 298° which was the reciprocal of the gyro of 118°

which the ship had been steering. The ship had been on a gyro course of 118° from noon on November 14th, the day before [79-81, 89, 107]. Lookouts were posted about the ship. The Master communicated by radio telephone with the United States Coast Guard *Weather Ship E* which was in the vicinity. He also radioed the office of the company in New York. The search was continued until 5:16 p. m. when darkness set in and the ship then resumed her course of 118° by gyro [79, 87, 111].

These were the facts as testified to by the Master, Captain Arthur T. Wilder, and by the Navigator, Captain Robert J. Ware. The testimony of Captain Wilder was taken by deposition by the defendant and read into the record by the plaintiff as part of her case. Captain Wilder at the time of the trial was employed as a pilot by the United States Government on the Panama Canal and arrangements could not be made for his attendance at the trial. Captain Ware, who had not been employed by the defendant for more than two years, testified on behalf of the defendant. No factual testimony was offered by the plaintiff. The entire case of plaintiff, as to the rescue, was based on the testimony of plaintiff's expert, Captain Theodore I. Feinne.

The plaintiff's case is based upon an answer to a hypothetical question by Captain Feinne that, in his opinion, the Master did not make a competent and efficient search. The claims of negligence appear to be:

(1) That the Master did not interview every member of the crew and every one of the passengers;

(2) That the Master only communicated with the U. S. Coast Guard Weather Ship once and did not radio other vessels;

(3) That the Master did not request any instructions from his home office as to how to proceed;

(4) That the Master could have used swivel lights that might have shown out 25 to 100 feet on the water;

(5) That the Master should not have given up the search when darkness set in at 5:16, but should have remained in the area until daylight and resumed the search;

(6) That he did not get a fix at 10:20 a. m. or a couple of minutes later on November 15th;

(7) That the Master did not take into account wind or set of the current;

(8) That the ship never returned to its position at the time when the man was last known to be alive aboard the vessel;

(9) That the Master had not reversed course on a reciprocal course but had reversed course on a parallel course and was twelve to thirteen miles south of a reciprocal course.

As to (1) there was no reason why the Master should have interviewed every one aboard the vessel. The only persons who had any knowledge regarding Miller were interviewed. The only facts regarding Miller were given by Levy and Aiken and nothing further developed at any subsequent time. When the Master had all department heads search the vessel, it must be assumed that the head of each department asked the men in his department if anyone had seen Miller. This was necessarily so when they were taking part in the search. It is only reasonable to assume that, if anyone had any information, he would have come forward. The Master of the vessel properly directed the search instead of taking the time to interview all persons aboard.

As to (2) the Master communicated with the U. S. Coast Guard Weather Ship by radio telephone and not by telegram as stated in plaintiff-appellant's brief. (Radio telephone was used not telegraph [96].) Captain Feinne agreed that the Coast Guard would relay the message to all ships and that this would be the best way because the Coast Guard vessel had more frequencies [421-424] [737-738].

As to (3) the answer is that, although he advised the home office of the disappearance, no instructions were given as obviously the responsible officials in New York felt that it should be handled by the Captain who was at the scene [737].

As to (4) the use of lights showing only 25 to 100 feet would make it almost an impossibility to pick up a man in the water and would also blind the lookouts so that it would be impossible to see. Anyone who is familiar with night vision can realize that it would be easier to pick up a man at sea without lights than with lights [727].

As to (5) if the vessel had remained in the area until daylight the next morning, the decedent, if he were alive, would have been in the water a minimum of 24 hours as it was reasonable to believe that he had gone overboard before daylight the day before. Furthermore, he would have drifted further with the current or set and it would have been impossible to have followed any course which would have reasonably come upon the decedent. The experts for the defendant, Captain Sheridan and Captain Umstead testified that, in their opinion, it would have been useless to have continued the search. Even Captain Feinne, on cross examination, admitted that it would have been ridiculous to continue the search [440].

The answers to (6), (7), (8) and (9) have to do with the method of search, and will be discussed together.

We are here concerned with the very fundamental proposition as to what is the proper method of search when a seaman disappears from a ship during the night and the disappearance is not known until he is discovered missing several hours later. In the case at bar, it is undisputed that Miller was last seen alive at 11:30 p. m. on November 14. When he left the ship, no one knows, but it is believed that it was prior to 6:00, when daylight set in, as otherwise he might have been seen. It is likewise undisputed that there was no duty to commence the search prior to the Master being notified that Miller was missing at 10:20 a. m. on November 15th.

The vessel had taken leave from Ambrose on November 10th on a course of 106° true by gyro. This course was changed on Tuesday morning, November 13th, at 6:30 to 112° true by gyro. On November 14th at noon the course was again changed to 118° true by gyro, which was the course the vessel was on at 10:20 a. m. on November 15th [115a, 116a].

Upon being notified of Miller's disappearance, the Master turned the vessel about by making a 270° turn, and headed the bow back into the wake from which the stern had immediately come out of. He put the vessel on a course of 298° which was the reciprocal of the course of 118° which the vessel had been on from noon of the day before. The testimony of Captain Wilder is clear that he did not make a "U" turn, but that he did get back on a reciprocal course. The testimony of Captain Ware, who was the Navigator, is even more specific. He not only testified that the vessel made a 270° turn, but that the bow of the ship headed into its wake and that he was able to see the wake. This was reiterated throughout the direct testimony of Captain Ware and also on cross examination. This testimony is uncontradicted.

The issue raised by the testimony of plaintiff's expert, Captain Feinne, was that the vessel should have proceeded back to the point where the decedent was last known to be alive, which was 11:30 p. m. on November 14. Captain Feinne gave, as his opinion, that the vessel, when she was turned around at 10:20 a. m. on November 15th, was on a parallel course and not on a reciprocal course. He based his opinion on a chart which he prepared and on which he charted the course of the vessel from the noon position on November 14th to 10:20 a. m. on the 15th. He stated that the vessel had been making a course good over the ground of 120°. He further stated that the vessel should have been put on a reverse course of 300° and should have returned to the point on the earth's surface where Miller was last known to be alive.

The testimony of the Master, Captain Wilder, and Captain Ware, the Navigator, and of Captain Thomas I.

Sheridan and Captain Charles E. Umstead, the two experts who testified for the defendant, was that the ship should not have returned to the point on the earth's surface where the decedent was last known to be alive. This was based on their opinion that, when he went overboard, if he remained afloat, he did not remain in the same geographical position, but was affected by the wind, set and current to the same extent as the vessel. The opinion was that only by the ship going back in its wake would there be any possibility of coming upon the decedent, if he were still afloat.

It was repeatedly asserted by Captain Ware and by Captain Sheridan and Captain Umstead, that it made no difference geographically where the decedent went overboard or where the vessel was at 10:20 a. m., but that the important thing was the relative positions of the decedent, if he were still afloat, and the vessel. Captain Sheridan, defendant's expert, testified that current was the movement of the water and that with the wind and the set, the whole water moved carrying both the ship and the man and that the relative positions of the two did not change.

The experts for the defendant testified that not only was the method of search used by the Master of the vessel correct but it was the only possible means he could have used and that to have taken a course back to the geographical position or the latitude and longitude where the man was last seen would have been an improper method of search. The plaintiff's witness, Captain Feinne, did admit that the vessel and the man would have been effected to the same extent by the wind and the current. He also admitted that, if the vessel had headed back into her wake, the ship would have been on a reciprocal course, then he became confused, but he said that couldn't have been so, although Captain Ware specifically testified that he had seen the wake and that the bow of the ship had headed into it. Captain Feinne testified that the ship could have not have headed into her wake because he contended that the course made good over the ground from noon to 10:20 a. m. was 120° true, although the vessel had been steering 118° true

by gyro. The expert for the defendant as well as Captain Ware contended that the course made good over the ground made no difference for the reason that, in reversing the course, the same conditions of wind and set would have affected the vessel on a reverse course as it would on her course coming down. They testified that they did not know if the ship had been making a true course over the ground at 120° and it didn't make any difference. Captain Feinne persisted in his error and contended that in going back, the ship should have been put on a course of 300° instead of 298° to offset what he contended was the difference between the steering course of 118° and the 120° made good over the ground.

The contention of Captain Feinne was that the vessel should have gone back to the geographical point where the decedent was last seen and then commence a search. He also contended that the Master should have steered a course back of 300°, which, in his opinion, would have been the course made good over the ground on the bottom of the ocean. This Court would seem to be able to take judicial notice of the fact that at 11:30 p. m. or whatever subsequent time the decedent went overboard, the decedent did not remain in the geographical position where he went overboard, but was deflected by wind and current as was likewise the vessel to the same effect.

Even if it be assumed that the contention by Captain Feinne, plaintiff's expert, that the ship should have taken a reverse course of 300° and gone back to the point on the earth's surface where the decedent was last known to be alive, there is an insurmountable objection to his contention. Captain Feinne testified that the vessel, from noon the day before, had been making a course good over the ground of 120° true, although it had been steering 118° true. Captain Feinne prepared a chart, which was introduced as plaintiff's exhibit No. 34, in which he charted the course of the vessel from the noon position given in the log as of November 14th. Captain Feinne testified that this was the last known position or fix of the vessel. There is no evidence or testimony offered that the noon

position in the log on November 14th was correct. The evidence in the case is that the vessel took leave from Ambrose on a gyro course of 106°, which was changed to 112° on Tuesday and changed at noon on November 14th to 118° true by gyro. The logbook shows that from the time the vessel left New York, it was partly cloudy and overcast. There was nothing to indicate that the vessel's position was ascertained at any time by fixes. The probability is that the ship was proceeding by dead reckoning from the time she left New York. On the basis of dead reckoning, the ship's position at any time shown in the log would be the course times the speed of the vessel. On this basis, no allowances would be made for wind, current or set or errors in steering. These errors could only have been corrected if at any time an opportunity had been offered to take a fix by observation of celestial bodies. The testimony of Captain Ware is that he does not recall that he was able to take any fixes on November 13th, 14th or 15th. There was a discussion about taking a line on the sun which would not have given a fix but merely would have indicated where the vessel was on a particular line. To get a position or fix at any time two lines are required one line is not enough. The probabilities are that the ship was proceeding on a dead reckoning from the time she left New York. There was no testimony offered and there is no evidence that the position shown as of noon on November 14th was arrived at by taking a fix. If the noon position of November 14th was arrived at by dead reckoning, the Master could have done nothing other than to have turned about his ship and have headed into the wake and followed the reciprocal of 118° or 298°, which was his course by dead reckoning.

In *Ferro v. United States Lines Co.*, 74 F. S. 250, which also involved a man going overboard, when the man was missed a search was made from 4:30 a. m. to 5:25 a. m., when the Chief Engineer notified the Captain of the missing man's disappearance. The ship was put about at that time

and put on a reverse course and the area searched for about two hours. The Court said:

> "Neither the Master, the officers or other members of the crew knew at this time that Ferro had fallen or jumped overboard. While Hearn had some basis for seeking out Ferro to 'straighten him out a little' there is nothing to indicate that he had reason to believe Ferro had gone overboard. The intensive search of the ship negatives the idea. Unless there was reason to believe that Ferro had gone overboard there was no neglect in failing to turn the ship about at once. When the search proved fruitless, at 5:25 A. M., and the Master was informed, the ship reversed its course, stationed extra lookouts and cruised in the vicinity for over two hours. After it was realized that Ferro must have jumped overboard, nothing was omitted which was reasonably practicable in an effort to locate him and effect a rescue."

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

Excerpts From Transcript of Testimony.

ROBERT WARE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Flynn:

* * * * * *

(594) Q. Mr. Ware, how long have you been going to sea? A. Approximately 13 years.

Q. What did you first go to sea as? A. Mess boy.

Q. On what ship? A. The *Green Mountain.*

Q. What was the next ship you went on? A. I think it was the *Nelson Dingley.* I don't recall.

Q. In what capacity? A. Ordinary seaman.

Q. And the next ship? A. I don't recall, sir. There is quite a few of them.

Q. When did you first go to work for Farrell Lines? A. In 1948.

Q. In what capacity? A. Second Officer.

Q. You said you were on your second ship as an ordinary seaman. When did you become an able seaman? A. After sailing at sea for three years.

Q. And what year was that when you became an able seaman? A. Approximately 1944. I had time before going on that first steamship aboard yachts, ocean-going yachts, in 1939 and 1940.

(595) Q. Where do you live, Mr. Ware? A. In Boston, South Boston.

Q. On what vessels did you go to sea in 1939? A. I was ordinary seaman, able-bodied seaman, and starboard launchman aboard the ocean-going yacht *Vander.* She was 244-foot long.

Q. When you went to sea as an ordinary seaman in 1942, was it? A. Yes, sir.

Q. Where did you sail? A. I sailed the North Atlantic.

Q. That was during the war, was it not? A. Yes, sir.

Q. On American ships? A. American ships.

Q. When did you sit for your first license? A. I think in 1945. I am not sure of that.

Q. Mr. Ware, you came up through the horse-pipe, as we call it? A. Yes, sir.

Q. In other words, you came up from the ranks? A. Yes, sir.

Q. Where did you sit for that license? A. My first license was in Baltimore, I believe.

(596) Q. What license was that? A. That was third officer's license, third mate.

Q. Third officer, third mate? A. Yes, sir.

Q. And you became a third mate in 1945? A. Yes, sir.

Q. In what month of 1945? A. I don't recall.

Q. Well, was it the spring or summer? A. I think it was the summer.

Q. After you became third mate what was the first ship that you went on? A. I went aboard the *Stephen Johnson Field* for American Hawaiian Lines.

Q. Where did she go? A. She sailed the North Atlantic, and after a few trips on the North Atlantic travelled all over the world.

Q. On the same ship? A. Yes, sir. I was on there a couple of years.

Q. You were on there for a couple of years? A. Yes, sir.

Q. Do you recall when you left that ship? A. The date, no, sir, I don't.

Q. When did you become a second mate? (597) A. I was second mate on that ship one trip after I was third mate, the second trip on that ship.

Q. Where did you sit for your examination for second mate? A. Second mate I sat in Los Angeles, I believe.

Q. When did you become second mate? A. The second trip aboard the *Stephen Johnson Field.*

Q. And you left her, you say, in 1947? A. I think so, yes, sir.

Q. What was the next ship you were on? A. I don't recall. I went to work with Farrell Lines in 1948.

Q. Were you on any ships prior to the time you got off the ship of the American Hawaiian Line? A. Yes, I was. I was on a ship operated by Waterman Steamship Company, but I don't recall the name of it.

Q. And where did you go on her? A. I went to Germany.

Q. And how many trips did you make on her? A. I think two.

Q. In what capacity? A. As third officer.

(598) Q. When did you sit for your chief mate's license? A. In 1948, the latter part of 1948, I believe.

Q. And do you have a Master's license? A. Yes, I have. I have second issue of Master's license.

Q. Pardon? A. Second issue of Master's license.

Q. When did you first get your Master's license? A. The early part of 1950.

Q. That Master's license is good for five years, isn't it? A. Yes, it is.

Q. And you have had it renewed? A. Yes, I have.

Q. When did you first go to work for Farrell Lines? A. In 1948.

Q. On what ship? A. The *African Planet.*

Q. In what capacity were you on the *African Planet?* A. Second officer.

Q. Where did the *African Planet* go? A. She went to South and East Africa.

Q. How many trips did you make on the *African Planet?* A. Three trips.

(599) Q. As third officer? A. Second officer.

Q. Second officer? A. Yes, sir.

Q. You were second officer on her on all three trips? A. Yes, I was.

Q. That is the navigating officer, second officer? A. Yes, sir.

Q. When did you leave the *African Planet*? A. I left the *African Planet* in July, the 30th of July, 1950.

Q. What was the next ship you were on? A. The next ship was the *African Glade*.

Q. What was the first voyage you made on her? A. I went aboard the *African Glade* in November, the 2nd of November, 1950.

Q. And where did you go aboard the vessel? Where did you join the ship? A. New York.

Q. And where did the ship go from November 2nd to November 10th? A. She went down the Coast, picking up cargo.

Q. Do you know, remember what ports she called at? A. If I recall it was Baltimore, Philadelphia, (600) and probably Norfolk.

Q. Then you came back to New York? A. Yes, sir.

Q. Mr. Ware, Captain Ware, that is what is referred to as the coastwise voyage, is it not? A. Yes, sir.

Q. When you got back to New York do you recall what date you got back to New York, from the coastwise? A. November 9th.

Q. And you sailed the following day, did you not, from New York to Dakar, West Africa? A. Yes, sir.

Q. You were second mate on that ship? A. Yes, I was.

Q. And as such, second mate, you were the navigating officer? A. Yes, I was.

Q. Before the ship sailed what, if anything, did you do regarding charts and navigating equipment? A. I saw to it that the proper charts were on board for the coming voyage, saw to it that proper navigation equipment was on board for that coming voyage and laid down a great circle track for Dakar.

Q. Wait a minute, Captain. Isn't it the custom (601) or the duty of the navigator to obtain the necessary charts

covering the voyage that you are about to make? A. Yes, sir.

Q. Where do you get those charts? A. At the Hydrographic Office.

Q. Where? A In New York here. I think it is Lafayette Street.

Q. On this particular time did you go to the Hydrographic Office and get charts? A. Yes, I got some charts there, yes, sir.

Q. What do those charts cover? A. They cover the area that you are going to be sailing in.

Q. In other words, the entire ocean area from New York to West Africa and return? A. Yes, sir.

Q. Did you have any conversation with the Master of the vessel regarding the voyage? A. I recall that he told me where we were going, that we were going to Dakar.

Q. You hadn't sailed with Captain Wilder before, had you? A. No, I hadn't.

Q. When did you have your conference with Captain (602) Wilder? A. Prior to sailing, some time prior to sailing.

Q. Well, when did you make the preparations for the actual voyage? A. Some time before leaving. I can't recall.

Q. What did you do in that connection? A. Went up to the Hydrographic Office and got charts that were needed, notice to mariners, pilot charts for that time of year, for that area. That's about it.

Q. Did you inspect the navigation equipment aboard the vessel in the pilot house? A. Yes, I did.

Q. Mr. Ware, what is a gyro? We have been talking about a gyro. What is a gyro? A. A gyro is a compass on the ship that tells a true course. It is the true course that the vessel is making through the water. There is no error in that gyro. What that says is a true course.

Q. What operates the gyro compass? A. A master gyro, what we call a master gyro.

Q. Where is the master gyro located? A. It is located in a room by itself, what we call a gyro room.

(603) Q. In what part of the ship is that? A. On that ship it is on the bridge deck, aft of the bridge.

Q. What is the gyro itself? I am not talking about—what is the gyro mechanism that operates the gyro? A. What is it?

Q. Yes. A. It seeks the true North Pole, the true north, unlike any other compass on the ship.

Q. Isn't it a motor that operates by centrifugal force? A. That's right.

• • • • • •

(604) Q. You explain what a gyro is. A. It is a mechanism that points the compass card—operated from this master gyro it would seek true north, unlike any other compass on the vessel. That would be the easiest way to explain it, I think, the most simplest.

The Court: How does it operate? Can you explain that?

Q. What is the theory of the operation of a gyro, gyromatic compass? A. I'd rather go into the text book to explain that. It is quite an explanation.

Mr. Flynn: All right, I will withdraw the question.

Q. Was there a gyro compass aboard? A. Yes, sir.

Q. And what are repeater gyrocompasses? A. Repeaters are gyrocompasses operated off the master gyro.

Q. And where are they located? A. There is one on each wing of the bridge and one in the wheel house that the helmsman steers by, and one on the flying bridge.

Q. What other compass do you have aboard the ship? A. Magnetic compass.

(605) Q. What is a magnetic compass? A. A magnetic compass does not seek true north because of variation and deviation.

Robert Ware, for Defendant—Direct.

Q. What, first of all, Captain, is variation? A. Variation would be the difference in degrees that the compass needle is pointing from true north.

Q. That is a magnetic compass? A. That's right, because of minerals in the earth. It is seeking a magnetic pole.

Q. And that variation, does that differ in various parts of the ocean area? A. Yes, it does.

Q. And is that variation shown on the charts? A. Yes, it is.

Q. And in navigation do you have to consider the variation in each area? A. Yes, you do.

Q. That is as regards the magnetic compass? A. That's right.

Q. The gyro compass always points to true north, is that true? A. That's right.

Q. If it is working mechanically, properly? A. Yes, sir.

(606) Q. What is deviation? A. Deviation is the amount that compass is off from true north because of the metal surrounding it. Metals can throw that compass off from seeking its true north.

Q. And what is done to correct the deviation of the magnetic compass aboard a vessel? A. Well, by taking, working out a celestial problem to compensate for that and compensating the compass, it is.

Q. Captain, why do you have two compasses aboard, a gyro and also a magnetic? A. Well, we always use the gyro, but check the gyro with the magnetic compass at times. It is a safety factor.

Q. Well, in bygone days you only had a magnetic compass, did you not? A. Yes, sir.

Q. It is only in recent years that you have had a gyro-compass? A. That's right.

Q. And isn't it a true statement that you still have the magnetic compass in case the gyro goes out of order? (607) A. Yes, sir.

Robert Ware, for Defendant—Direct.

Q. Isn't it your experience aboard a vessel that the vessel is steered by the gyrocompass? A. Yes, sir.

Q. Before leaving New York on this trip did you—what did you do in connection with the course from New York to Dakar? A. I laid down a great circle track.

Q. What is a great circle track? A. It is the shortest distance between two ports on the chart.

Q. How did you do it? A. By using the great circle chart, taking the positions off and laying them on a Mercator's chart.

Q. What is a Mercator's chart? A. Well, that is a projection; it is a form of chart. There are different types of charts, gnomonic, Mercator, great circle. It is the one used in the chart room for navigational purposes.

Q. Before leaving New York on November 10th did you decide, yourself, or with the Master what courses and speeds you were going to follow? A. Yes. By laying down that great circle track that told us what course.

(608) Q. Where did you lay down the great circle track, from what point? A. From New York.

Q. From what point, Ambrose Lightship? A. Ambrose Lightship, yes.

Q. I show you Plaintiff's Exhibit 28 and ask you what was the course that the ship took from Ambrose Lightship on November the 10th? A. 98 degrees.

Q. Is that gyro course? A. Gyro, yes, sir.

Q. Before we go further, let me ask you this, Captain: Coming up and down the coast, we have been hearing a lot of talk about this question of fix. A. Pardon me?

Q. Yes, surely. A. That is set course 106 degrees gyro.

Q. 106 degrees gyro? A. Yes, sir.

Q. What was the other figure that you gave me? A. 98.

Q. Where did you get that from? A. That is—well, that was the beam of Ambrose Light.

(609) Q. That was not the course from Ambrose? A. No, sir.

Q. That course was 106 gyro? A. 106 degrees gyro.

Robert Ware, for Defendant—Direct.

Q. Captain, before going further on that, in going up and down the Coast, there are radio beacons, are there not? A. Yes, sir.

Q. In fixing the position of the ship, how do you do that along the Coast by radio beacons? A. By using the radio direction finder.

Q. How do you do it on a chart? In other words, you get a radio beacon. How many radio beacons do you get? A. Well, two or more makes a fix.

Q. Captain, what is longitude? A. Longitude is the meridians from north and south.

Q. What is known as west longitude? A. West longitude would be the longitude west of Greenwich, which starts at zero.

Q. There is how many degrees of longitude? A. There are 180 degrees. Well, there's 360 degrees longitude, there is 180 west and 180 east.

Q. What is latitude? (610) A. Latitude is the parallels going north and south on the chart.

Q. Captain, isn't it true that every point on the earth's surface has a definite longitude? A. That's right.

Q. Which is the position east or west of the Greenwich meridian? A. That's right.

Q. And that every place, every point on the earth's surface has a latitude either north or south? A. Yes, sir.

Q. North or south of what? A. North or south of the equator.

Q. If you are coming up the coast and you want to find out exactly what is the latitude and longitude, that is your position, isn't it, your latitude and longitude? A. Yes, sir, it is.

Q. And that is expressed in degrees and minutes, is it not? A. Yes, sir.

Q. If you want to find out your exact position coming up or down the coast and you get a radio beacon, say, at 90 degrees, and you get another one from 11[illegible] (611) degrees, what do you do when you get those radio beacons? A. From

the known object you are taking that bearing from you draw a line, and where those two lines cross that is where you are.

Q. On what do you draw the line? A. On the chart.

Q. You could even get a third radio beacon, couldn't you? A. Yes, you could.

Q. What do you do with that? A. The same thing, draw a ....e from that known position and where they cross that is a fix.

Q. In other words, Captain, from various lighthouses and radio stations along the coast they send out a message, do they not? A. Yes, they do.

Q. And if you know, you know from what bearing that message is coming from? A. Yes.

Q. Is that true? A. That is true.

Q. And then you plot it on the chart, do you not? A. Yes, sir.

Q. And how do you determine from either two radio (612) beacons or three radio beacons where your ship is along the coast? A. Where those lines or bearing lines cross, that is your latitude and longitude. That is where the ship is.

Q. And with such radio beacons you can determine almost exactly where you are, can you not? A. Quite close, yes, sir.

Q. Now you said that you left New York on a course of 106. A. That's right.

Q. Is that the course steered on the gyro? A. Yes, sir.

Q. And what time did you take course, take leave from Ambrose lightship? What I mean—that is, where you took off and took your course, your direction from Ambrose lightship. A. 11:00 p. m.

Q. Where is Ambrose Lightship? A. It is 19 miles outside the harbor, approximately. It is a lightship station out there.

Q. And you took leave of Ambrose Lightship at what time? A. 11:00 p. m.

Robert Ware, for Defendant—Direct.

(613) Q. On November the 10th? A. Yes, sir.

Q. And your course, your gyro course was what? A. 106.

Q. And how long did you maintain that course at 106? A. On November 13th we changed the course to 112.

Q. There are 360 degrees to the compass, are there not, Captain? A. Yes, sir.

Q. And what is the general direction of Dakar, West Africa, from New York? A. Approximately—in degrees, sir?

Q. Approximately what direction? A. Oh, it is south of east.

Q. In other words, it is down here, right (indicating)? New York is up here (indicating). A. Well, I'd rather go the other way.

Q. Oh, you would rather go the other way? A. Yes.

Q. All right. It is all the same. In other words, you would rather make this east? A. That's right.

Q. All right, sir, and that west. In other words, if New York is up here—now, Captain, due east is 90 (614) degrees, isn't it? A. Yes, sir.

Q. Due south is 180 degrees? A. That's right.

Q. And due west is 270 degrees? A. Yes, sir.

Q. When you left New York in what direction did you go? A. We steered 106 degrees.

Q. That would have been roughly in a southeasterly direction? A. Yes, sir.

Q. How long did you maintain that course of 106 degrees? A. Until November 13th. Then we changed the course to 112.

Q. When you left New York and you set a course of 106 degrees, as navigating officer what did you do in the chart room? Incidentally, you have a chart room, do you not? A. Yes, sir.

Q. Where is that chart room located on the C-2? A. It is on the port side, after the bridge, after the wheel house, on the bridge.

(615) Q. What is it used for? A. Navigation purposes, laying out the charts.

Q. That is where you lay out your courses, is it not? A. That's right.

Q. And you charted a course of 106 degrees and you maintained it to what period? A. November 13th.

Q. I asked you about getting fixes or position of the ship when you were along the coast. What do you do when you get beyond radio beacons or beyond the sight of land? A. Take celestial objects, the moon, the sun, the stars, planets.

Q. Isn't it true, Captain, that the stars, the moon and the sun on every day of the year are in exactly the same place in relation to the earth? A. No.

Q. Well, I mean— A. The planets are.

Q. Any day you can look in the Almanac and at any point obtain the declination of a particular star or earthly body on that occasion; is that correct? A. Yes, sir.

Q. In other words, in the movement of the earthly (616) bodies around the earth or through the heavens at particular times of the year they are in the same spot, is that true? A. Yes, sir.

Q. How do you determine where the particular bodies or particular stars or planets are at any particular time? A. By figuring out in the Almanac.

Q. Pardon? A. By figuring it out in the Almanac.

Q. I show you this book, the American Nautical Almanac for 1950.

Mr. Flynn: I ask that it be marked for identification, please.

(American Nautical Almanac for 1950 marked Defendant's Exhibit D for identification.)

Q. I show you this Nautical Almanac and I ask you what information is contained in that book? A. Oh, the Greenwich hour angle of the sun, the declination of the sun.

Robert Ware, for Defendant—Direct.

Q. What is declination, Captain? A. It is how many degrees the sun is north or south of the equator at certain times of the year.

Q. Well, what would you want to know what declination is for? (617) A. It is used in figuring out your fixes.

Q. How do you take a fix at sea or determine your position at sea, your latitude and longitude? A. How do you want me to answer that? Go through a problem or explain a problem?

Q. No. Just tell us generally as to how you do it. A. By taking a sight with a sextant of one of the heavenly bodies.

Q. What is a sextant? A. It is used to measure the angle of a body. It is an instrument used in navigation to measure the angle of bodies.

Q. And what does that give you? A. It would give you the angle of the body above the horizon or from the zenith in degrees, minutes and seconds.

Q. And what do you do with that when you get it? A. With that, and with Greenwich civil time and with declination and so forth, you work out a problem to find out.

Q. What do you do; when you get the angle of one body what do you do with that? A. You lay it on the chart as a line of position.

Q. You can do that on a star, can you not? (618) A. Yes, sir.

Q. You can do it on almost any heavenly body that is visible? A. Yes, sir.

Q. How do you get a second line of position? A. By doing the same thing on another star.

Q. What do you do with your second line of position? A. Lay it down on the chart.

Q. You can also get a third line of position from a third star, can you not? A. Yes, sir.

Q. What do you do with that? A. Lay it down on the chart.

Q. What is your position? A. Where they cross.

Robert Ware, for Defendant—Direct.

Q. What watch does a second mate, navigating officer serve? A. Usually the four to eight watch, four in the morning till eight in the morning, and four in the afternoon till eight in the evening.

Q. Why do you stand watches at those hours? A. Well, with four mates on the ship it is easier to navigate. You can get your position in the morning, your position at night.

(619) Q. When is the best time to get a position? A. At dawn and at twilight.

Q. Will you explain that? A. Well, it is easier then because you can still see the body and still have a clear horizon for the use of the sextant in bringing the body down to the horizon to measure the angle, get the proper amount of degrees, minutes and seconds that that body is in the sky.

Q. In other words, Captain, in order to get a sight on a heavenly body you have got to be able to see it, haven't you? A. Yes, sir.

Q. Visually? A. Yes, sir.

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(620) Q. Mr. Ware, what was the weather when you left New York on the 10th, the night of the 10th? A. On the 10th it was clear weather.

Q. What was it on the 11th, the following day? A. Overcast.

Q. What does overcast mean? A. The sky was covered with clouds.

Q. What was the weather on the 12th? A. Partly cloudy to overcast, mostly cloudy and overcast.

Q. What is the situation regarding the getting of a fix when the weather is cloudy or overcast? A. Well, if the bodies are not showing, if they cannot be seen, you cannot take a fix.

Q. When you left New York, you stated, I believe, that you set a gyro course of 106 degrees? A. Yes, sir.

Q. And I believe you also testified that prior (621) to leaving New York you had worked out a great circle course all the way to Dakar? A. Yes, sir.

Q. How long did you continue on the course of 106 degrees from Ambrose Lightship? A. Until November 13th, changed the course to 112.

Q. What time of the day was that? A. 6:30 in the morning.

Q. Do you know why you changed the course at that time from 106 to 112? A. To follow the great circle track to Dakar.

Q. When was the next time you changed the course? A. November 14th at 12 noon we changed the course to 118.

Q. What is dead reckoning, Mr. Ware? A. Well, when you cannot take sights by the celestial bodies you assume your speed and mark it off on the track for a position.

Q. Did you lay—what did you do this on, on the track that you laid out before you left New York? A. Yes, from our last known celestial fix, yes, sir.

Q. You knew where you were when you left Ambrose Lightship? A. Yes.

(622) Q. What would you say your DR, dead reckoning, was from Ambrose Lightship? A. What was my?

Q. Dead reckoning from Ambrose Lightship. A. I don't quite understand you, sir.

Q. Well, your dead reckoning from Ambrose Lightship would be the line on the chart from Ambrose Lightship at 106 degrees, would it not? A. Yes, it would.

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(623) Q. Now, Mr. Ware, the log book shows a noon position on each day, does it not? A. Yes, sir.

Q. What was the noon position shown on the 11th? A. 39.31 North and 70.01 West.

Q. Do you know how you obtained that position or how it was obtained? A. No, I don't.

Q. How could it have been obtained? A. By dead reckoning or by celestial navigation.

Q. What do you mean if it were obtained by dead reckoning? Will you explain that? A. By running up from our last known position, which would be Ambrose light, stepping off the estimated speed of the vessel on the track until noon of the 11th, and that would be our estimated position, our dead reckoning position to that day.

Q. In other words, actually computing the distance that you travelled from Ambrose Lightship on 11 o'clock of Friday night until noon on Saturday by the knots, in other words, the miles per hour of the ship? A. Yes, sir.

Q. How else could you have obtained your noon position? (624) A. By taking sights of the celestial bodies.

Q. What sight would you take at noon? A. Take the sun or anything else that would be up there at the time.

Q. What was the weather on the 11th? A. Overcast.

Q. Do you know whether you took a sight on that day or not? A. No, I don't recall. I couldn't have according to the log. It is overcast throughout.

Q. And if it is overcast and you can't get a sight on the sun then your noon position is your dead reckoning position? A. Yes, sir.

Q. When did you change course from 106? A. On November 13th.

Q. And to what did you change your course? A. To 112 degrees.

Q. Can you tell us why you changed your course? A. To keep close to the great circle track, to be on the great circle track to Dakar.

Q. That is the track that you had plotted out before you left New York? A. Yes, sir.

(625) Q. When did you next change course? A. On November 14th.

Q. At what time? A. 12 noon.

Q. And to what did you change your course? A. To 118 degrees.

Robert Ware, for Defendant—Direct.

Q. What was the weather on the 12th? A. Partly cloudy, mostly cloudy to overcast.

Q. What was the weather on the 13th? A. I am sorry. I am reading the 14th. The weather on the 12th was partly cloudy to overcast. The weather on the 13th was mostly cloudy to overcast.

Q. The 14th? A. The 14th was mostly cloudy to overcast.

Q. And the 15th? A. The 15th was overcast to partly cloudy.

Q. In other words, according to the log, Mr. Ware, you had overcast and cloudy weather from the time you left New York on the night of November 10th, is that correct? A. Yes, sir.

Q. Do you know whether you—do you recall whether you were able at any time to get a sight on any of those days from the sun or other celestial body? (626) A. No, I don't.

Q. What do you do, if you get a sight on the sun, if you have only one celestial body? A. You lay down on the chart what is called a line of position.

Q. That is on the sun? A. Yes, sir.

Q. Well, you told me before you used two lines, where you crossed. How do you get the other line? A. By taking another body in the sky, two different lines of position, two bodies, would make a cross.

Q. But suppose you only had one body, the sun? A. You would take a line of position, and then wait for the opportunity to cross the meridian at noon, and that would give you your fix for the day, the noon position.

Q. How about your dead reckoning position? A. Any time you take the sight of the sun it gives you a line of position. You could be any place on that line. You could assume to be any place on that line.

Q. Any place on what line? A. On the line of position from the sun, the sight of the sun.

(627) Q. In other words, getting a line on the sun, that doesn't give you your exact position, does it? A. No, it doesn't.

Q. With one line? A. No, it doesn't.

Q. And you don't know whether on any of the days from the 10th to the 15th you were even able to get one line of position, do you? A. No, I don't.

Q. Where did you get—on Saturday and Sunday and Monday, if you had not got it from the sun line, where would you have obtained your noon position? A. From dead reckoning.

Q. In other words, the course from New York, from Ambrose light, times your speed would tell you where you were? A. Yes, sir.

Q. How long, Mr. Ware, did you continue the course of 118 degrees that was set on November 14th at noon? A. At 10:30 in the morning of November 15th.

Q. Now, let me ask you this: You left New York, you were on a course of 106 degrees, then you testified that you changed to a course of 112 degrees, and (628) then you changed to a course of 118 degrees. At any time when you changed the course from 106 to 112 to 118 did you make any allowance whatever for wind or current? A. No, sir.

Q. Now we come down to the morning of the 15th. Will you tell us what happened on the morning of the 15th, so far as you can recall? A. On the morning of the 15th a man was reported overboard, missing.

Q. When did you first hear about that? A. I was called to the bridge.

Q. At about what time? A. Some time in the morning, after ten.

Mr. Kaplow: If your Honor please, may the record show that the witness is not now testifying from his own recollection but is using the log to refresh his recollection?

The Court: Yes.

Mr. Flynn: If your Honor please, the log does not show what time he was called to the bridge.

The Court: Well, he is using the log to refresh his recollection. I think that is a fair statement.

Mr. Flynn: But not on that. The log doesn't (629) show that, the last question.

The Court: I think it is a fair statement to say that he is using it to refresh his recollection and it is quite proper that he should. There is no objection.

Mr. Kaplow: No objection to it, sir.

Mr. Flynn: Yes, but the log couldn't show what time he was called. There is nothing in the log about that.

The Court: Mr. Flynn, I have made a ruling and I think that the record is clear. You need not make any further comment.

Mr. Flynn: Yes, sir.

Q. What time were you called to the bridge, Mr. Ware, approximately? A. Approximately 10:20.

Q. And what was the occasion? A. There was a man reported missing.

Q. Who else was on the bridge at the time? A. The captain.

Q. Anyone else? A. Junior third officer.

Q. And you had been on a course—what had been your course since noon of the day previous? (630) A. At noon the day previous we changed to 118.

Q. On what course were you on at 10 a. m. on the 15th? A. 118.

Q. And when was that course changed? A. At 10:30.

Q. Now will you explain—where were you at the time the course was changed? A. On the bridge.

Q. Will you tell the Court and jury what was done regarding how the course of the ship was changed? A. The ship was changed, we changed 270 degrees. We came around to the right.

Q. Would you like to come down here and mark it on the blackboard? A. (At blackboard) We were steering a

course of 118. At 10:30 we changed course. We swung the ship around 270 degrees. That would be 180. We went three-quarters around the quadrant until we met the ship's wake; then put the bow of the ship in the ship's wake and steamed back on a reciprocal course of 298 degrees.

Q. In other words, Captain, this is your course of 118 degrees going East? (631) A. Yes, sir.

Q. And you made a 270 degree turn and turned into the wake and then you steered a course of what? A. 298 degrees.

Q. Mr. Ware, where were you when the ship changed the course? A. On the bridge.

Q. Did you observe the actual movements of the ship? A. Yes, I did.

Q. Could you see the wake of the ship? A. Yes, I could.

Q. And what happened as regards the ship and its wake? A. We steamed into the wake and headed back.

Q. And what, if anything, was done regarding lookouts? A. Lookouts were posted.

Q. Where? A. On the bow, on the bridge.

Q. Anyone posted on the flying bridge? A. Yes, sir.

Q. How long did you maintain that course of 298 degrees? A. Until 5:16 that same day, 5:16 p. m.

(632) Q. What occurred then? A. Because of darkness the vessel was turned around.

Q. Captain, you testified that from the time you left New York on a course of 106 and changed to 112 and 118 that you made no allowance for wind and current. A. No, sir.

Q. Isn't it true that on your course of 118 if a man had gone overboard he would have been affected by the current and the set and the wind to the same degree as the ship? A. Yes, sir.

Q. What is current? A. It is the setting of the water due to wind and tide.

Robert Ware, for Defendant—Cross.

Q. That is the movement of the whole water, isn't it? A. Yes, sir.

Q. And everything on the water moves with it? A. Yes, sir.

Q. In going back on a course of 298 did you make any allowance for wind and current? A. No, sir.

Q. Was there any change, any appreciable change in the weather conditions from noon on the 14th through (633) the 15th as regards wind and current? A. No, sir.

Mr. Flynn: You may cross-examine.

The Court: I would like to ask him one or two questions, please.

By the Court:

Q. Captain, you sailed a good deal on waters near the equator, haven't you? A. Yes, I have.

Q. And you also sailed, as I understand, in the North Atlantic during the war? A. Yes, sir.

Q. So that you are familiar with weather conditions in both parts of the Atlantic, is that right? A. Yes, sir.

Q. Can you state whether the length of the twilight and dusk at the equator is shorter or longer than the length of the twilight and dusk in the North Atlantic? A. It is shorter.

The Court: Thank you. You may examine.

Mr. Flynn: Could we approach the bench, please, a moment, sir?

The Court: Yes.

(Discussion at the bench on the record.)

(634) *Cross examination by Mr. Kaplow:*

Q. Mr. Ware, you told us that you served on the *African Planet* from 1948 until July 1950 as second mate, is that correct? A. That's right.

Robert Ware, for Defendant—Cross.

Q. And am I correct that you first joined the *African Glade* on November 2, 1950, as second mate? A. Yes, sir.

Q. Did you have any vessel in between those two? A. No. I was home on vacation.

Q. What vessels have you had since the *African Glade*? Will you please give us the dates and the names of the vessels? A. I was chief officer on the *African Star* from 5/11/51 to 8/27/51. These run consecutively. And I was chief officer on the *African Star* from 8/28/51 to 9/12/51. Chief officer on the *African Star* from 9/13/51 to 11/29/51.

Chief officer on the *African Star* from 11/30/51 to 6/16/52.

Chief officer on the *African Crescent* from 9/18/52 to 1/4/53.

Chief officer on the *African Pilot* from 1/20/53 to 4/14/53.

(635) Chief officer on the *African Pilot* from 4/23/53 to 5/26/53.

Chief officer on the *African Pilot* from 5/27/53 to 9/10/53.

Chief officer on the *African Pilgrim* from 11/27/53 to 2/11/54.

Chief officer on the *African Pilgrim* from 2/12/54 to 2/17/54.

Q. Have you sailed since the last service on board a vessel? A. No, I haven't.

Q. That is you have been away from sea for over a year, is that right? A. Yes, sir. I have been away from sailing steamships for that time. I have sailed on other boats.

Q. When did the voyage 15 end on the *African Glade*? A. January 25, 1951.

Q. Did you get off that vessel at the end of that voyage? A. No. I stayed on for another trip.

Q. From when to when was that? A. From February —well, from January 26 to February 5th was the coastwise voyage, and from February 6th to April 26th was the foreign voyage.

(636) Q. Have you ever sailed as Master? A. Of a steamship?

Q. Of a steamship. A. No, sir.

Q. Captain, something puzzles me here. If you are going 118 degrees, as you have told us, true on November 14th and you made a 270-degree turn, would you come back to 298 degrees true? A. After getting in the wake we went back to 298, after the bow of the ship was in the wake.

Q. Isn't it true that in order to get from 118 to 298 you only have to go 180 degrees? A. But that would be running a course——

Q. Isn't that true, that to go from 118 degrees to 298 the reciprocal course you would only have to turn 180 degrees; wouldn't you? A. Not to get back on the original course, no, sir.

Q. I didn't ask you that, Captain. I asked you whether or not you get back to 298 degrees by making a semi-circle of 180 degrees when you have been coming 118 degrees true? A. That would be, yes, sir.

Q. So that when you told us you turned 270 degrees and you indicated on this drawing that you just merely (637) reached the line that was drawn for you here, representing 118 degrees true, that wasn't quite accurate, was it? A. It is accurate, yes, sir.

Q. Isn't it true that if you go to 170 degrees you are going 90 degrees more than 180 degrees; isn't that true? A. I stated it was 270 degrees until we reached the wake and then made a course of 298 degrees, a reciprocal course.

Q. Isn't it true that if you go from 118 degrees, in order to get back to 298 degrees, all you have to go is 180 degrees? A. Yes, sir.

Q. But you went 270 degrees, didn't you? A. Yes, sir.

Q. Where did the 270 degrees carry you? A. It carried me up to the wake of the ship; making the turn dropped us below that track, and to get up on to the wake of the ship, to that course, it took 270 degrees to do it, before turning to 298.

Robert Ware, for Defendant—Cross.

Q. When this decision was made to change the course to 298 did the captain—did you make the decision or did the captain make the decision? A. No, that would be the captain's decision.

(638) Q. Not whether it would have been. This is very important. Your recollection of what took place is what we are seeking, sir. Did you make the decision 298 degrees or did the captain make the decision? A. The captain made it.

Q. Where did he make that decision? A. On the bridge.

Q. And did you bring any charts out to him when he made that decision? A. No, sir.

Q. Did he use any instruments when he made that decision? A. No, sir.

Q. Did he ask you to go down to the plotting room or the chart room and chart the new position? A. No, sir.

Q. Did he ask you what the noon fix was of November 14th? A. I don't recall, no, sir.

Q. Did he ask you what the noon fix was of November 13th? A. No, sir.

Q. What position would you get if you knew the noon position of November 13th and the noon position of (639) November 14th? A. I don't understand you. What position would I get?

Q. Well, I will reframe the question. What course, could you tell what course you were making good if you knew the noon position of the 13th and the noon position of the 14th? A. We were steering 118. That was our course.

Q. What does the term "over the ground" or "over the land" mean in referring to a course? A. It is the course the vessel is making over the ground, from one point to another.

Q. And that is different from the true course sometimes, isn't it? A. Yes, sir.

Q. How do you determine the actual course that you are making, when you have a noon position of one day and a

noon position of the day before and no other positions in between? How do you determine that? A. By laying it off with parallel rulers.

Q. Did you know where you were or where the vessel was on November 15th at 10:30 or 10:20 a. m.? A. Yes, sir.

Q. Where were you? Where was the vessel? (640) A. So many miles in a dead reckoning position from last noon, the last noon position.

Q. How do you fix that? A. By running up the amount of hours and the amount of speed that you think the vessel is making to that point.

Q. In other words, that is guesswork? A. It is dead reckoning, yes, sir.

Q. When you took this position or the fix on November 14th, while you were making a course 112 degrees true do you know whether you had taken a fix by celestial bodies? A. No, I don't recall.

Q. By the way, could you take a fix or your position from heavenly bodies, celestial bodies, when it is partly cloudy out? A. From the sun, yes. From other bodies it is very difficult, practically impossible.

Q. Talking about the sun, isn't it true that you can take one line of position from the sun and then a half an hour, an hour later, or when you pass the meridian you can take another line of the sun and that will give you your line of position at the intersection of those two lines? A. Only at one certain time of the day, when the (641) sun crosses the meridian.

Q. You can take two lines from the sun, can't you? A. Only at that particular time of day.

Q. But you can do it? A. Once a day, yes, sir.

Q. And if it was partly cloudy at 7 a. m. and then was mostly cloudy, do you know whether or not you could have taken two positions from the sun? A. You could not take two positions from the sun, no, sir.

Q. Now at any time were you called upon to find out what course the vessel was making between noon of Novem-

ber 14th and 10:30 a. m. of November 15th? A. No, sir. We were making a course of 118 degrees.

Q. Well, that would be the true, the steering true, wouldn't it? A. True course, yes, sir.

Q. That wouldn't be the actual course over the ground, would it? A. I don't know.

Q. You don't know? A. No, I don't.

Q. Well, you have your noon positions, don't you? (642) A. Yes, sir.

Q. Can't you tell from your noon positions? A. You asked me from noon on the 14th to 10:30 on the morning of the 15th. I didn't plot or look up any course for that.

Q. Then how could you tell where, what course the vessel was making good over the ground? A. How could I tell?

Q. Yes. A. I didn't tell because it wasn't important at the time.

Q. Well, at 12 noon on November 15th you got a position, didn't you? A. Probably a dead reckoning position, yes, sir.

Q. You say probably? A. Yes, sir, dead reckoning position.

Q. You don't know for sure, do you? A. No, I don't.

Q. And if the weather was shown as partly cloudy, is it your contention that you could not have had a fix on celestial bodies? A. Very possible, yes, sir.

Q. I don't think I understood the answer. Perhaps I made the question too complex. Could you have taken (643) celestial body fixes when the weather was shown as partly cloudy? A. Possibly not, no, if the clouds were covering those bodies, no, you could not.

Q. Possibly yes, as the clouds went by? A. Possibly.

Q. How long does it take to take a position from a heavenly body, a celestial body? A. Oh, not long.

Q. How long? A. A minute.

Q. Partly cloudy indicates that there is some clearness sometimes, doesn't it? A. Yes, sir.

Robert Ware, for Defendant—Cross.

Q. Isn't it probable that this, the latitude and longitude that you have given for your noon position on the 15th was taken with a fix on celestial bodies? A. I don't recall, no, sir.

Q. Isn't it probable where you only have partly cloudy, after this mission was started at 10:20 a. m. and you knew where you were going to try to find somebody, isn't it probable that you were going to take a fix or do everything in your power to take a fix? A. Regardless of position—position has nothing (644) to do with it, sir.

Q. Oh, position has nothing to do with it? A. No, sir.

Q. You tell me why. A. Regardless of where the ship was geographically, as long as we took the reciprocal course to get back, to find whoever went overboard, the position has nothing to do with it, whether we are in the North Atlantic or the South Atlantic, as long as we took a reciprocal course.

Q. Did you ever hear of a parallel course? A. Yes, sir. That is why we turned 270 degrees to avoid a parallel course, to go back on our original course.

Q. In your opinion you went back on original course, not on a parallel course, is that right? A. No, sir. We get back in the ship's wake, as close as we could, right into the wake.

Q. Would that be a parallel course or reciprocal course? A. It would be a reciprocal course.

Q. Does the fact that the vessel, according to your noon position the 14th to the noon position of the 15th indicates a course being made good over the ground of 120 degrees—(645) A. That is possible.

Q. —while you are steering, is 118 degrees true, would that fact make any difference in your opinion that you have just given us that you were going back on a reciprocal and not on a parallel course? A. Absolutely not.

Q. Mr. Ware, would you do me the courtesy of coming up to this blackboard here so I can ask you a couple of

questions here on this chart? A. (The witness goes over to blackboard.)

The Court: You are now exhibiting exhibit what?
Mr. Kaplow: 34, your Honor.
The Court: Plaintiff's Exhibit 34.

Q. What is this chart, Mr. Ware? A. The North Atlantic Ocean, southern sheet.

Q. That is the official Government navigation chart, isn't it? A. Yes, it is.

Q. Is that the same chart that you have on board the vessel? A. Yes, sir.

Q. This is a document which has been introduced into evidence on the basis of Captain Feinne's testimony. He was a master mariner. He drew certain lines on (646) this drawing showing the position of the vessel starting from when she was—the noon of November 14th until she made her turnaround and then was on her way back. You will note that he has drawn this line of 118 degrees true, and then he has also drawn this line of 298 degrees true at a distance, although parallel—in other words, he has drawn it as a parallel course, based upon the log and based upon your noon positions given in the log.

Will you examine this for a moment so that I can ask you a question about it? A. All right.

Q. In your opinion is this an accurate portrayal of the course that the ship was taking when she was going back 298 degrees true? A. Would you say that again, please?

(Question read.)

A. I don't know. I can't tell from just looking at that chart. This is true that we were steering 118 degrees true. It is also true that we went back 298 degrees, the reciprocal course.

Q. Now, Captain Fienne has drawn this not as a reciprocal course, but as a parallel course. There is no confusion about that, is there? (647) A. Yes, there is.

Q. This representation here shows that it is a parallel course, doesn't it? A. On that chart by Captain Fienne, yes, sir.

Q. I am asking you is there any instrument that you want to use to check whether or not this is a parallel course? A. From 10:30 a. m., when the ship was turned around by Captain Fienne——

Q. You mean by Captain Wilder. A. Captain Feinne put this on here, didn't he?

Q. I am sorry. I didn't follow you. A. From 10:30 a. m., when the ship was turned around to 5:16 p. m., when the ship—that is as far back as she went, it shows one point the ship was turned around to 298 degrees. That is exactly opposite. Captain Fienne put this on the chart, from the time 10:30, turning around, going 298 degrees is the exact opposite course, regardless if it is here, here, or here (indicating).

Q. Well now, let us go into that regardless of whether it is here, here or here. You were headed toward Dakar and a man was missing overboard. Wouldn't it have made a difference whether it was here on the (648) top or in the middle or on the bottom of this chart? A. Heading for Dakar, yes.

Q. Are you trying to tell us that it does not make any difference where in this ocean this man was; is that what you are trying to tell us? A. No. I am trying to tell you——

Mr. Flynn: If your Honor please, I object to the question by counsel.

The Court: Yes, sustained. Objection sustained.

You are arguing with the witness and I don't think the question is proper.

Mr. Kaplow: I certainly don't intend to argue with the witness. I would like it to be clear.

The Court: He didn't say anything like that. Reserve your arguments until a little later point in the case.

Mr. Kaplow: If your Honor please, may I be heard for just a moment longer?

The Court: Yes. You may put a proper question to the witness, but I don't want you to argue the evidence.

Q. Does geographical position make any difference when you are drawing your lines, showing your course of 118 degrees true? A. From one point to another?

(649) Q. Yes. A. I wish you would make that question more clear.

Q. You said— A. From where to where?

Q. If I understand correctly, it wouldn't make any difference whether it was 118 degrees true up here or 118 degrees true over here or 118 degrees true down here (indicating). Isn't that what you said? A. Yes, sir.

Q. Wouldn't it make a difference if a man was overboard while you were on your way to Dakar, whether you were 118 degrees over here or 118 degrees over here or 118 degrees down here (indicating)? A. On the way to Dakar, yes, it would.

Q. So that when we are going back to try to find a man, isn't the objective to try to get back on your actual course that you were coming forward on? A. Yes, sir.

Q. And if you did not take into account the course that you were making over the ground, which was 120 degrees, how could you be back on your right and regular course that you had been coming on if you turned your vessel 298 degrees true instead of 300 degrees true? A. The course over the ground has nothing to do (650) with it, sir.

Q. Has nothing to do with it? A. No, sir.

Q. Wouldn't it put you off a distance of about 11 to 14 miles from where you thought you were? A. It would put the body off the same distance.

Q. Let's get to the person overboard. Is it your opinion that a body on the surface of the water moves with the

same speed as a vessel in the water? A. Yes, sir, in common, yes, sir.

Q. Exactly the same speed? A. I'd say so, yes, sir.

Q. 160 to 180-pound man moves the same speed as a 6,000-ton vessel? A. Yes, sir. It is a body of water moving; anything in that body of water——

Q. It is not affected by the surface, winds and currents? A. The winds in the book are negligible; they are light.

Q. What were the winds in the book? A. Force 3.

Q. What is force 3? A. Approximately eight to twelve miles in an hour.

(651) Q. What was the current? A. I don't know.

Q. Did you have current charts aboard the vessel? A. Yes, sir.

Q. If you had a slight southerly sea, a moderate southerly sea, what would that mean? A. Oh, waves probably three feet, approximately three feet.

Q. And you still say that the vessel would move in the same direction with respect to current and wind as a body would? A. Yes, sir; anything in that body of water would move the same. It is a body of water that is moving.

Q. At the same rate of speed? A. I would say so, yes, sir.

Q. Now, these entries that are in this log, the November 14th noon time and November 15th noon time, do you have any independent recollection as to whether they were made, the position entries that I am talking about, were made by taking fixes or by dead reckoning? A. No, I don't.

Q. Now, whether they were taken by fixes or they were taken by dead reckoning, wouldn't they show—and when I say "they," I mean the noon position of the 14th (652) and the noon position of the 15th, wouldn't they show the actual course that the vessel was taking? A. Over the ground not through the water.

Q. Do they show that they was making 120 degrees over the ground? A. I don't know. I never laid it out.

Q. Do you want to lay it out now? A. It doesn't matter. It is not important.

Q. In your opinion it wouldn't make any difference? A. Absolutely not.

Q. Whether it was 120 or 118, whether the course that you were making over the ground was not the same as the true course that you were steering, in your opinion it wouldn't make any difference when you turned around to 298 true? A. No, sir, because the same effect would tend to be used on the ship on the way back as going down. The weather conditions were the same during that 24-hour period.

Q. Despite the fact that you were many hours late and despite the fact that you were turning around and the body was drifting somewhere? A. Drifting the same as the ship.

Q. And you are firmly convinced of that? (653) A. Yes, sir.

Q. When you take the position or when you used dead reckoning, don't you take into account wind and current? A. No, sir, you don't have to.

Q. Don't you do it? A. No, sir. Sometimes——

Q. Dead reckoning? A. No, sir.

Q. Now, was any position taken of the vessel at 5:16 p. m. on November 15th? A. No, sir.

Q. So at that time the vessel actually did not know where it was, did it? A. By dead reckoning, yes, sir.

Q. But you didn't—by that you didn't know, whether you had reached a point where the vessel had been the previous night at 11:30, did you? A. No, sir.

Q. Had you ever been to West Africa before. A. No. That was my first trip to West Africa on that ship.

Q. How old are you? A. I am thirty-one.

* * * * * *

(654) Q. By the way, when you have been sailing by the use of dead reckoning for a couple of days, and then suddenly there is clearing in the sky, is it customary to then attempt to take a fix to find your actual position? A. Yes, sir.

Q. Did you do the same—did you do that on November 13th? We have a reading here in the log and I can read it to you.

"10 p. m., weather remarks: Scattered clouds, moderate northwesterly sea and swell. Visibility good."

Did you take a reading then? Do you remember? A. When was this, sir? On the 13th?

Q. November 13th, 10 p. m. A. I don't recall, no, sir.

Q. Isn't it probable that you did take a reading, since you had been running, according to your testimony, (655) on dead reckoning most of the time? A. Most of the time, yes, sir.

Q. Isn't it probable that you did take a reading, a fix on celestial bodies at that time? A. I don't recall, no, sir.

Q. You were in the deck department of the *African Glade*, weren't you? A. Yes, sir.

Q. The deck department has as its head the chief officer, is that correct? A. The chief officer runs the deck department, yes, sir.

Q. You had the second officer, yourself? A. Yes, sir.

Q. And a third officer? A. Yes, sir.

Q. And a junior third? A. That's right.

Q. And how many A. B.'s? A. Nine A. B.'s.

Q. And how many O. S.'s? A. Three ordinary seamen.

Q. Did you have a boatswain? A. A boatswain, a carpenter and two deck maintenance (656) men.

Q. Do you know how many men from the deck department were sent by the captain to search the vessel for Mr. Miller? A. No, I don't recall. I was on the bridge.

Q. Do you know how many men he posted for lookout? A. I don't recall, no, sir.

Q. Do you know whether the captain used any of the men from any of the other departments besides the deck department? A. I don't recall, no, sir.

Q. You don't even recall whether he used any deck department men, do you? A. They were lookouts, yes, sir.

Q. You ordinarily have a lookout on a watch anyhow, don't you? A. Not during the day, no, sir.

Q. Do you know how many they used during the search? A. No, I don't.

Robert Ware, for Defendant—Cross.

Q. Were you there? A. I was on lookout, myself, most of the day, all of the day.

Q. Now, when for the first time did the captain ask you to give him the ship's position after the search (657) was ended? A. According to the log—I don't recall. There was a noon position in the log book of that day, during the search.

Q. You mean November 16th? A. November 15th. There is a noon position entered in the log book.

Q. That was during the search? A. Yes, sir.

Q. How about after the search had ended? A. After the search was ended, the next position from the log book is at noon on the 16th.

Q. There were no positions in between that? A. No, sir.

Q. I ask you to read the weather remarks, November 15th, commencing at 10 p. m. Doesn't that say "Scattered clouds and slight southerly sea and swell"? A. Yes, sir.

Q. And haven't you told us that you could take sights at that time if you were going by dead reckoning previous to that? A. You don't take sights at 10 o'clock at night, sir.

Q. How do you obtain your position at that time? A. You don't. You run on dead reckoning and wait (658) for dawn for your next sights.

Q. You don't use the celestial bodies at that time? A. No, sir, not at 10 at night.

* * * * * *

(659) By Mr. Kaplow:

Q. I would just like to read you two questions from Captain Wilder's testimony at page 26. It commences at the bottom of page 25:

"Q. Before you made your decision between 10:20 a. m. and 10:30 a. m. on November 15th what charts or other instruments did you have available to you to enable you to make the decision to return to a 298-degree true course? A. We had all the navigation equipment.

"Q. What does that constitute? A. Compass, charts, sextant.

"Q. Did you use those in making the decision to turn the vessel about and retrace on a course of 298 degrees true? A. Yes, sir."

Did the captain use any instruments or any charts in turning about or in giving you the answer? A. The charts and those instruments are always laid out in the chart room. They are on the table.

Q. I didn't ask you that. Did the captain——

Mr. Flynn: Please let him finish. Answer the (660) question

Q. Did the captain use those when he gave the order to turn about 298 degrees true? A. I don't recall.

Q. You were in the room, weren't you? A. Not in the chart room. I could have been on the bridge.

Q. You were on the bridge with the captain. I think that is what you just told us. A. Yes, sir.

The Court: I won't permit you to press the matter further. You have asked for this witness's recollection of what the captain did and you are coming very close to asking one witness to say whether another witness told the truth, which is highly improper. If the witness says he has no recollection, you are bound by that answer, and I won't permit you to pursue it any further.

Mr. Kaplow: No further questions.

Mr. Flynn: On the question of the captain, we had all the navigation equipment. In other words, it was a general question.

The Court: Yes, but the question Mr. Kaplow is interested in is the last one, "Did you use it?" (661) The captain said he did. He is asking this witness whether the captain used it. This witness says he doesn't recall. He might have been on the other end

of the bridge. He wasn't in the chart room. That is enough on that point.

Mr. Kaplow: No further questions.

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(662) THOMAS W. SHERIDAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Flynn:

Q. Captain, what licenses do you hold? A. Master's license unlimited for any ocean, sail and steam, both sail and steamships.

Q. And when did you first go to sea, Captain? A. About 1904.

Q. And how old were you then? A. I was about sixteen.

Q. And what type of ship did you go to sea in at that time? A. First I went to sea on a sailing ship for a short trip; then I went to the nautical school (663) from which I am a graduate.

Q. What school is that? A. That is the New York State Nautical School. It is now the New York State Maritime College. I graduated from that. Then I went out in sailings ships, became an officer in sail.

Q. What part of the world did you go in sailing ships? A. All around the world, around Cape Horn, Cape of Good Hope. We were in the Trans-Pacific trade, the trade from Philadelphia, the east coast of the United States to Japan and China.

Q. When did you first go to sea in a steamship? A. In 1910. I went as an officer in various steamers. I sailed in cargo ships, liners.

Q. In what capacity? A. As an officer, second, third, so forth, first officer.

Q. When did you receive your license as a Master of steamship? A. In 1912.

Thomas W. Sheridan, for Defendant—Direct.

Q. What other types of ships have you sailed in? A. I sailed in submarines, destroyers, battleships, cruisers, airplane carriers, mine carrying ships. I was in command of a mine carrying ship. I was in (664) command of a cruiser transport. I have been navigator of cruiser transports. I have been in command of a number of passenger ships and freighters and so forth and special purpose vessels, including a floating drydock, one of these drydocks that move around.

Q. Were you in the United States Navy, sir? A. Yes, sir.

Q. During what period? A. I was in both the First World War and the Second World War.

Q. When did you graduate from the New York Nautical School? A. 1906.

Q. And subsequent to your graduation what has been your experience in regard to instruction? A. Instruction? From the period of 1913 to about just before 1920, with the exception of the time I was in the Navy during the war, I was either a senior instructor or superintendent in the New York State Nautical School which is now, as I said, the New York State Maritime Academy—College.

Q. Captain, after World War I what did you do? A. I took—I first took a ship which was chartered by the Greek Navy in the war with the Turks. That was a vittling ship and service ship and so forth. (665) And then I came back and took a number of cargo ships. I took one or two—two, I think—large cargo ships of the same dimensions, more or less, as this one under consideration. Then I took command of a passenger ship.

Q. What ship was that? A. The *Callao*, in the Pan-American Steamship Line. Then it was called the Munson Line, but it was the Pan-American Steamship Line of South America.

Q. What trade was she in? A. She was from New York to Rio do Janeiro, to Buenos Aires, and so forth, down the east coast of South America.

Thomas W. Sheridan, for Defendant—Direct.

Q. What were your duties during the Second World War? A. Second World War, I started in by being Commander of Training Group A. That was a group of ships trained for anti-submarine work and so forth, and I took the ships to Panama and was down there until 1942, from 40 to 42, during which time I took over several ships which were seized including the *Conte Baincomano.*

I took over some Nicaragua naval ships which I brought down to Panama, and I executed various other duties in addition to the ordinary duties aboard (666) ship in command of a ship.

Q. And from 1942 on what did you do? A. I came up and took command of a base down the coast, where I had about 20 or 30 ships, including sailing ships for anti-submarine work, and Coast Guard cutters and so forth, just south of Cape Hatteras, in trying to stop the submarine ravages.

Then I went out to the South Pacific where I took command of a floating drydock for a while. I was a pilot in Espirita Santa, took the ships in and put them in the two drydocks; had command of one drydock.

Q. While you were at Cape Hatteras, Captain, what did your duties consist of? A. It was just south of Cape Hatteras, a place called Odoco. I was in command of the base. I supervised the operations of a number of ships, anti-submarine ships.

Q. Those ships that you supervised were engaged in anti-submarine warfare? A. Yes, we were patrolling that point. That was a dangerous point, convergence for convoys, and we patrolled that point, had to keep the submarines down or away.

(667) Q. Then after you left that base you went to the South Pacific? A. Yes, and I took command of a drydock. Then I became a convoy commodore.

Q. What is a convoy commodore? A. He takes charge of convoys going up—we went from Noumea or from Espirita Santa or from any one of the converging ports, the

build-up ports, so to speak, and took the ships on up into the war area, up to Guadalcanal, and so forth.

Q. Captain, I ask you again—I think I did—how long were you teaching in the New York Nautical College? A. Between 1913-1920.

Q. What was your position there? A. I was either senior instructor or superintendent. I taught seamanship, navigation, ship handling, naval construction and so forth, all the things which a deck officer and some of the engineering personnel has to have to adequately perform his duties aboard a ship.

Q. During that period of time how many men did you teach or were under your teaching supervision? A. Oh, I don't know, but a large number. Well, the present captains were some pupils of mine, (668) captains and marine superintendents and so forth. I couldn't say. There were about, I should say, 30 to 50 a year came out, graduated. We didn't have large classes.

Q. Now, Captain, after you went out to the Pacific as a convoy commodore, how long were you in that capacity? A. I was there until about 1944. Then I came back and went on active duty at the end of the war.

Q. Are you now retired from the sea? A. Not entirely, every once in a while, though I am somewhat hampered by a broken hip, I go out on a trial trip of a ship, where my specialized knowledge is of use in ascertaining turning circles, maneuvering qualities or testing the heeling of the ship under certain conditions and so forth, that sort of thing.

Q. What have you done in that capacity, since 1944? A. Well, I have taken ships out and tested them for turning circles because a ship has a different turning circle with each loading condition and under certain loading conditions they want to know the turning circle, in case of collisions or something like that. It is a m[illegible] matter, and I would do that and give my report.

(669) Then ships, for instance, which have capsized or something like that, I make an investigation and figures on that sort of thing, and the backing, also the backing qualities of ships and so forth.

Q. And you have done that since 1944? A. Yes. Not so much because of my broken hip.

Q. Captain, what navigational equipment does a C-2 cargo ship carry? A. Well, they carry compasses, polaruses. Compasses, there are two kinds of compass, magnetic and gyro, and they are fitted with the gyro, which is the more accurate.

Q. What is a magnetic compass? A. A magnetic compass is a compass which is motivated by the magnetic energy in the earth, and lays in a direction parallel to the magnetic meridian unless deflected by local conditions, such as magnetism in the ship, which deflects the compass and has to be corrected.

Q. That is known as deviation, isn't it, Captain? A. Deviation. Variation is the angle between the magnetic pole and the real pole. That is the geographical pole. The deviation is the difference between the magnetic meridian that the (670) compasses should take up and the actual heading of the compass which is deflected due to that magnetism in the ship.

Q. What is the gyro compass, Captain? A. The gyro compass is a compass which utilizes the gyro principal, that any rapidly wheeling body takes a motion parallel to the axis of motion imparted to it, so that the gyroscopic compass takes the axis of that compass, whirling rapidly, takes the same direction as the axis of the earth, which is north and south direction. That gyro compass is in a central portion of the ship from which repeater wires would have a step by step connection by electricity, and there are repeaters throughout, at various strategic positions to repeat the indications of the gyro compass, so that you can steer by it or take bearings by it.

Q In other words, Captain, a gyro compass points to true north? A. Yes, sir. Certain corrections have to be made for the latitude and the speed of the ship, but they are almost automatic.

Q. What would you say as to the accuracy of a gyro compass as compared to the magnetic compass? A. Oh, there is a difference. A magnetic compass (671) varies with the latitude. It varies with the heel of the ship. Though there are corrections for that they are never perfect, and it varies with various other things. For instance, if a man comes up near a magnetic compass with a pocket knife in his pocket, he may deflect it.

Q. Would that be true of a gyro compass? A. No, sir.

Q. Well, Captain, why does a ship carry two compasses? A. Because a gyro compass, being a mechanical contrivance, may cease to function for some reason or other, and then your magnetic compass, being better than nothing, people who have navigated for centuries by a magnetic compass, with all its defects, takes the place of the gyro. It is like getting on a horse if your automobile breaks down.

Q. Isn't it true, Captain, that ships carry a magnetic compass today only in reserve in the event the gyro goes out of order? A. That's right.

Q. Modern ships do not steer by magnetic compass, is that true? A. No, they don't navigate by the magnetic compass.

(672) Q. Captain, in a trip, a voyage from New York to Dakar, West Africa, what charts would a ship carry or procure for that voyage? A. Well, they would have the charts of the coastal area, the charts of the coastal area by each end of the route, around Dakar and around New York, and the coast, east coast of the United States, and they would also have an ocean chart, they would have a track chart, and they would have maybe a magnetic chart if they wanted one, or the Great Circle chart, though the Great Circle chart is not used so much in that kind of a

route because it is simpler to figure out the Great Circle course than it is to plot it.

Q. Well, Captain, in your opinion what should a master or a navigator or both do before they left on a voyage from New York to Dakar, West Africa? A. Well, make sure they have the right charts. Those charts are corrected up to date from the reports of the hydrographic office and the Coast Guard, the Coast Geodetic Survey, see the charts are corrected, up to date, see that the equipment is in good condition.

Q. What, if anything, Captain, should the master or navigator do in planning the actual course? (673) A. He lays out the course, either by calculation or on the chart. In a long distance like that he would calculate it as being the more accurate and rapid method of doing it. It only takes a few minutes to do it.

Q. How would he do that? A. He would calculate it by taking the spherical triangle and calculating the Great Circle course.

Then he would lay that down on the immediate chart of the coast to see that it didn't hit anything, that he was going clear.

Q. What do you mean he would lay it down on the chart? A. He would draw it out. For instance, he would have a chart of the coast, of the Atlantic Coast of the United States down to Bermuda and so forth, and he would lay out the course to see that it went clear.

Having ascertained that, he would steer the course when the time came from Ambrose Channel Lightship.

Q. And would he do that all the way to Dakar? A. Well, as I say, he might lay it down on the chart and draw the course out or he would calculate. (674) Each time he would get a position or each day he would get a position—it wouldn't matter in between—he would figure out the Great Circle course and make, with allowances for current and wind and so forth, he would steer it.

Q. Captain, what is your definition of true course over the ground? A. True course over the ground is the course

made good on the chart, you might say, the angle, the distance times the distance along the angle that the ship made with the meridian.

Q. What is your definition of course through the water? A. The course through the water is the wake that the ship makes, the line through the water that it makes as it proceeds on its course.

Q. What is the difference, Captain, between true course made over ground and the course through the water? A. Well, the course through the water is subject to the deflections of the current and so forth, and the course over the ground is the true course that is made actually on the progress toward the destination.

(675) Q. In other words, the true course over the ground represents the difference that the ship had been deflected by current or wind? A. Yes, the difference between the two is the deflection.

Q. Captain, what is the term dead reckoning? A. Dead reckoning is where you lay down the angle that the ship makes, the ship's course makes with the meridian, and put a line there, and measure off the distance, either by calculation—usually they do it by the traverse tables—by calculation or by the chart. When you are out in the ocean the scale of the chart is so small that you don't use it. You use a plotting sheet which is a planning chart made to a scale, or use the traverse tables in the book which are right angle triangle solutions of the simple plane trigonometrical problem involved.

Q. How do you determine your position by this plotting method by dead reckoning? A. By dead reckoning?

Q. Yes, sir. A. All you do is put the distance down along the course or courses and that gives you the point at which you have arrived for which you desire the dead reckoning position.

(676) Q. Captain, what is a fix? A. A fix is a position obtained generally by observation of astronomical bodies or by bearings of shore items, for instance, lighthouses. If

we took two or three lighthouses and cross the bearings from them or took two or three stars or the sun at different times we would get a fix.

Q. When you are outside of the view of land and you have no radio beacons how do you obtain a fix? A. You observe an altitude of a heavenly body, and it is a simple thing, the process is simple, though the mathematical solution is a little intricate. In principle what you do is cross the two circles which—for instance, you take an altitude of a body——

Q. How do you take that altitude, Captain? A. With a sextant.

Q. What is a sextant? A. A sextant is an instrument for measuring the angle or distance between two points in sight.

Q. And if you were taking, say, on two starts, just how would you do it? A. You would take an altitude on one and you would take the time, and then you would take the (677) altitude of the other one and take the time.

Q. What would you do with those altitudes and times; you got the altitude and time on one star and then the altitude and time on the other; what would you do with it? A. From that you would compute the altitude from an assumed position, and with that computation you would compare that computed altitude with the two altitudes and the difference would be the number of miles out, and you draw a line at right angles to the bearing of the body of the instant observation and you would be somewhere on that line when you put it down from the assumed position, allowing for the intercept, as it is called.

Q. Where would you get the true altitude of that body? A. The true altitude of the body would be got by correcting the observed altitude for various deflected elements.

Q. What is shown in the Almanac on a particular day and hour of each of these heavenly bodies? A. It gives you the declination, right ascension, and, well, equasion of time, if you need it, and the Greenwich hour angle.

That is the longitude of each (678) body. Each body's position at any instant of time is put in—over the Earth—is put in there and if you are right under that body, the latitude and longitude, the declination and the Greenwich hour angle, which is the longitude expressed in time, would give you the position of the body.

For instance, if that light up there were in declination 20 degrees north and longitude 3 hours west, that is 45 degrees, and you stood under it, stood under the body and your altitude was 90 degrees, your position, your exact position would be the position of that body over the Earth, but it is a little bit more complicated than that because the bodies are never directly overhead.

So you take the altitude and compare the altitude between the position that you have assumed and the position and the altitude, if it had been in a position you assumed, and the true altitude observed, and there you get what is called an intercept, and you move the line of position so, either to or from the body; having drawn that line and drawn several lines, where they cross, and the nearest supposed effective one is a 90 degrees crossing, you obtain the position of the ship.

(679) Q. Now, Captain, in other words, when you got a first line from one star, you would plot that on a chart? A. Yes.

Q. And then you would get a line from another star? A. Yes.

Q. What would you do for that? A. Plot the same thing on a chart.

Q. And might you also possibly get a line on a third star? A. Yes. That would be what you would call a cocked hat. You would get a little angle; there would be a little difference due to personal error or so forth, a very small one, and you would take the center of the triangle which you would find by drawing the three lines on the plotting sheet as it is called.

Q. In other words, Captain, getting three lines is more accurate than two lines? A. Yes.

Q. And where the lines cross is where you are, is that correct? A. Yes. With the sun you have to use a (680) different method. If you only got the sun, you take an altitude in the morning, when the sun bears east, or in the afternoon when it bears west; then at noon or somewhere near noon when it has made a substantial change in bearing in azimuth; you take another sight, bringing the first line, which you have gotten in the way I have described, up to the second line; you find the position at the time of your second observation.

Q. That is not nearly as accurate as taking a line on the stars— A. No, but it is sufficient—

Q. —is it? A. No, it is not, but it is sufficient for practical purposes.

Q. Is that what is called a 1-line position? A. 1-line position. 1 line alone, unless you cross—it would be just a general guide, like telling a man he was on Broadway without telling him what street he was on.

Q. In other words, in taking a 1-line position you could determine where you were on a certain line, you could determine you were on a certain line, but you couldn't determine where you were on that line, (681) is that true? A. That's right; that is correct.

Q. You just knew you were along a certain line in the ocean, but just where, without having another line, you could not determine it, is that it? A. That is correct.

Q. Captain, isn't it true that in order to get a sight on the sun or on any heavenly body you have to be able to see it? A. Yes, sir.

Q. What do you do or what is done if you cannot see through the clouds, you cannot see a heavenly body? A. You proceed by dead reckoning or if you are near the coast, you use radar bearings.

Q. Captain, if it is overcast and cloudy, it would be very difficult to get a sun sight, would it not? A. Yes.

Q. In other words, unless you could see the sun you couldn't get one? A. Unless you could see the sun you couldn't get one.

Q. Captain, what is current? (682) A. Current is the movement of the water in the ocean or anywhere else, for that matter, over the surface of the Earth, due to various obscure causes in many cases.

Q. Now, Captain, do all objects on the water move at the same rate or at different rates with the current? A. They move as the current moves. There may be a little surface, one way or the other. The currents are not entirely solid. What I mean to say is nobody can tell how much the current will move you because while the tables give averages they are not accurate. But whatever object is in the water moves with the current. Whether you know how the current is moving or not, it moves. If two men go overboard, no matter what direction the current is, they will maintain their own relative positions by their own motion through the water, not through any other reason.

Q. What do you mean by relative position, Captain? A. The position—for instance, if two men went overboard and one was north of the other and the other being south of him, if they stayed without (683) moving in the water, floated, and didn't make any movement, they would remain north and south of each other, not matter what current they were in.

Q. How about, Captain, a ship in the water, and a man or another object overboard? A. The current will affect both the same to the same extent.

Q. Captain, assuming that the SS. *African Glade*, a C-2 cargo ship of approximately 6000 tons departed from New York on the night of November 10, 1950, and took leave of Ambrose Lightship on a course of 106 degrees by gyro; that she maintained an average speed of approximately 14½ knots; that on the following day, that she maintained that course of 106 degrees gyro until 6:30 a. m. on November 13, 1950, at which time she changed to a gyro course of

112 degrees; that she maintained a course of 112 degrees until noon on November 14, 1950, at which time she changed to a gyro course of 118 degrees;

Assuming that—and that she maintained that course of 118 degrees until 10:30 on November 15, 1950—assuming that from 11:30 on the night of November 14 there was a wind of force 3; assuming, (684) further, that at or about 10:20 a. m. on November 15, 1950, the master was advised that a man had disappeared from the vessel; further, that he had last been seen pacing the deck, the main deck, just after the midship house;

Assuming further that the master of the ship had a search made of the entire vessel; that immediately and simultaneously he had the ship put about on a 270 degree turn; that he came about and actually turned the ship, the bow of the ship into the wake out of which his stern had just emerged; that immediately upon getting into the wake he set a gyro course of 298 degrees by gyro;

Assuming further that he continued that course of 298 degrees; and assuming also that he posted lookouts on the bow, the bridge, the flying bridge and the various other parts of the ship with binoculars;

Assuming that he continued on that gyro course of 298 degrees until darkness set in at 5:16, at which time he resumed his original course of 118 degrees;

In your opinion, Captain, was that the proper and seamanlike manner in which to turn the ship back (685) to search for a man who had fallen overboard at sometime subsequent to 11:30 the night before, the time which he went overboard not being known; in your opinion, Captain, was that a proper and seamanlike search? A. Yes, sir.

Q. And will you please state your reasons for your opinion? A. My opinion is based on the fact that when he turned he had to regain the previous path or wake in which he had been.

Now, not only ships, but everything with keels and wings, in making a turn, makes a distance for the original

course to the right or left according to which way the turn is made.

If you turn to the right you will go out a distance of, roughly speaking—it is called the transfer by ship handlers; it is a thing that every third mate knows, the transfer of about three ship lengths or four ship lengths, according to the type of ship and the loading. When you have gone out that circle, you would be off the—there would be a difference between the original line you were on and the course you were on if you reversed your course. (686) So, you have got to converge, and that is the reason that he made the 270 degree first, and then when he reached the wake, which I believe he saw or he calculated, he turned back into the reverse course, which was exactly the right thing to do.

Q. Captain, will you illustrate on the blackboard this 270 degree turn?

(Witness at blackboard.)

A. That, roughly speaking, is the course upon which the ship had been on. Now, if he had tried to turn around and reverse his course, when he turned like that, he would be here, and he would be off the track. That is the original wake. Instead of that, he turned a course 90 degrees with the thing until he, gradually, regained it, to the original wake, and having regained the original wake he went back in a reverse course and retraced his track, which was the right thing to do, geometrically speaking and actually.

If he had gone back on the 298 course from here, he would have been going up parallel and a distance of three or four ship lengths, or maybe five ship lengths, which on that ship would be about 2500 feet off the track.

(687) Q. Well, Captain, isn't it your opinion that the ship, from the previous noon, when it had been on a course of 118 degrees, had been deflected somewhat by the current? A. Probably so, yes

Q. What about the decedent who had gone overboard at some time subsequent to 11:30 the night before? A. The

most probable position that he had been on would be on the line from the ship of 298 degrees, which is the reverse of 118. If he was afloat.

Q. Captain, what significance, if any——

(Will the Court excuse my back, please?)

The Court: Yes, certainly.

Q. What significance, if any, Captain, did the actual geographical position of the ship have at 10:30 a. m. on the 15th? A. Absolutely none. The position of the ship geographically had nothing to do with it because it was a relative movement of a man and the ship, or rather the ship toward the man that counted in the water. Anymore than this building here might be in Vladivostok, but our relative positions would be (688) the same if we were sitting in the room, and how we moved around would affect each other.

Q. Captain, in your opinion, should the master at 10:30 have endeavored to ascertain his actual geographical position? A. Not for any reason of picking up the man, and at 10:30 he would only get a line position, if he hadn't had stars before that, and then his position would be by dead reckoning by his star position. But at 10:30 in the morning he would only get one line of position, anyhow.

Q. Captain, in your opinion, could the master or the navigator have plotted out on a chart the position where the decedent might be if on the water and plot an actual course back to that position? A. Only the course, the reverse of the course that he had taken, no other course. No other course would be practical or sensible.

Q. Captain, is there any other thing that the master could have done except to have gone back in his wake on a course, a reverse course of 298 degrees? A. No other practical expedient was open to him.

Q. Captain, from the period of midnight the night before until 10:30 that day there was a wind of (689) force 3. What is a wind of force 3? A. Force 3 would be about 8 knot

wind, very small pressure, very small effect, and the effect on the ship would be practically nil.

Q. What would the effect of such a wind be on the man in the water? A. That would be doubtful, but very little. The sea would have more, some effect on him, but you can't calculate that.

Q. Now, Captain, on the wind, on a course of 118 degrees and a reverse course of 298 degrees— A. What was the direction?

Q. Pardon? A. What was the direction of the wind at that time?

Q. The direction of the wind slightly southerly. A. The wind had been very low. It had been force 2, 3 to 4, and 3. It had been very low the night before.

Q. And can you tell by looking at the log, Captain, what direction the wind was? A. Yes.

Q. Will you tell us what the log indicates as the direction? (690) A. At 4 a. m. the wind was northwest force 2. At 8 a. m. it was northwest force 3 to 4.

Q. On what date was that? A. That was on the 14th of November.

Q. Better look at the 15th. What was it on the 15th? A. At 4 a. m. it was force 5. It looks like—or 3. I can't tell. Oh, wait a minute, 3; it is 3, force 3. It was 3 all along, 4, 8 and noon.

Q. In other words, Captain, you had a wind of force 3 from [illegible]dnight of the 14th through the 15th, is that true? A. Yes. It was northwest.

Q. Northwest? A. It was right behind you. So even if there were any force to it it would have no deflecting effect.

Q. Well, let me ask you this, Captain: What difference did the wind at force 3 have from the course that the ship had been going on at 118 and when she reversed her course? A. Practically nothing.

(Witness back on witness stand.)

Q. To clear up one thing, Captain, you said (691) on the wind—are you referring to the direction of the wind or the direction from whence the wind is coming? A. From whence the wind is coming. That is what you do when you say northwest wind; it is coming from the northwest.

Q. But actually the wind was blowing south. A. Southeast.

Q. Southeast? A. Southeast. The ship was heading nearly southeast.

Q. Captain, what is your opinion as to the possibility of finding any object in the water after darkness? A. Well, practically impossible. Just by the most extreme case of good luck you might find a man in the water, if it was a man.

Q. Assuming that the ship had lights that would show out a period of a hundred feet from the vessel? A. Well, if you did come on the man; if by a fortuitous concatenation of felicitous circumstances you did reach the man you would run him down because you would be going at such a speed (692) in that short period of visibility of a hundred feet you couldn't stop the ship in time to avoid hitting the man. You would kill him anyhow. And if he was near the ship, the swash of the propeller, he would be swashed in under the propeller and be killed.

And moreover it is a very dangerous thing to do.

Q. Assuming, Captain, that the decedent went overboard at No. 4 hatch just aft of the midship house, that the ship was proceeding through the water at 14½ knots, what is your opinion as regards the effect of the suction of the ship, of his being drawn into the propellor? A. The probabilities are that he would be.

Q. Captain, in your opinion, was there any other possible alternative method that the master of this vessel could have used other than have gone back in his own wake on the reverse gyro course? A. No, sir. That is the only method. In my opinion that is the only method that was practicable or possible or might possibly yield any proper results.

Mr. Flynn: You may examine, Mr. Kaplow.

(693) *Cross examination by Mr. Kaplow:*

Q. Captain, did you ever have command of a C-2? A. No. I have had them under my command, though. I have had them in convoys.

Q. But you, yourself, never were master of a C-2? A. No.

Q. Have you ever made any turning tests on a C-2? A. No.

Q. What type of vessels did you make turning tests for? A. Well, Liberty ships, liners, naval vessels.

Q. And would the turning test of a C-2 be different than the turning test of a Liberty ship or a liner? A. Some slight differences. There is a general conformity, though, in the characteristics of a turning circle. The seamanship books generally have pictures, and they give it about in three to five ship lengths, the diameter of the turning circle. The captain of the ship knows his own ship's characteristics generally.

(694) Q. When was the last time, Captain, that you were at sea as a master? A. In command of a ship was, in an actual ship was in 1942, though I have had command of groups of ships since then.

Q. When you say you commanded groups of ships, what were your duties? A. I was a commodore captain, commodore of the convoy. I took the convoy up, maneuvered the convoy, navigated, supervised the navigation.

Q. Were you master of the ship that was leading the convoy? A. No, no. I was in command of the whole group of ships.

Q. Was there a master over you? A. No, under me.

Q. By the way, with respect to this gyro compass does it have to be set before you start out on your voyage? A. It has to be started, and the repeaters have to be oriented with the master gyro.

Q. And do you have to see if there are any corrections that have to be made on the gyro before you start your voyage? (695) A. Well, the gyro generally, when you

start it up and get it up to the proper velocity—it varies a little bit with different types—assumes the meridian. The master gyro takes the angle with the meridian necessary. For instance, if the ship is heading west, the gyro, the north point of the compass will tally, whatever it might be. It shows the heading of the ship. Then from there you have the repeaters coincide with the gyro heading, and that is all——

Q. And you have to check that before you start on your voyage? A. Check it before you start.

Q. Now, assume, Captain, that a vessel, the *African Glade*, was averaging 14.6 or 14.5 knots. How many minutes would it take to make a mile? A. It would take just close to four minutes to make a mile, a little bit over four minutes.

Q. And if a vessel made 180 degree turnabout what distance would it travel? A. If she made a 180 degree turn that would depend upon the tactical qualities of the ship, but it would be about—she would have to travel about six, seven ship lengths.

Q. And about how long would that be? (696) A. Well, it is according to the ship.

Q. In miles? A. In the case of that ship, that ship is 400 some feet long, 430 feet to make a rough figure; six times that would be 2,400 feet; six times 30, 2,580 feet; say 2,600 feet. That is a half a mile, close to half a mile.

Q. And does that depend upon the amount of the rudder that is used? A. It depends upon the amount of the rudder and it depends upon the loading of the ship. The captain himself, that is one of the things he knows. He knows that by his experience. He knows that by his observation and he knows that by the calculations.

Q. Now, assuming that you make an additional 90-degree turn, in addition to the 180-degree turn; assume a 6,000-ton C-2 loaded; what distance would it travel then? A. Well, it would depend, as I said, on the tactical qualities of the ship. But a ship turning like that would have

reached her maximum velocity, angular velocity, and it wouldn't take long to make that turn.

Q. How long would you estimate? A. Oh, to make an additional 90 degrees after she has made a 280-degree turn——

Q. After 180-degree. (697) A. After 180-degree turn, she would have to go about two ship lengths; she would probably take an additional—that would be 800, nearly 900 feet; that would be about—that would be three-quarters of a minute.

Q. If a vessel was making—A. That is, of course, only rough figures, and not from actual—you have to know the ship to give those figures. That is only rough.

Q. It could take a little longer to do it too, couldn't it? A. Could take a little longer or shorter, according to the tactical capabilities of the ship.

Q. Now, if the ship was taking four minutes to make one mile, this C-2 going at the rate of 14½ knots an hour, how long would it take her to complete that turn that we have just been talking about of 270 degrees; that is the 180 plus the 90? A. Well, roughly speaking, she would take, say, eight lengths altogether; eight times four is thirty-two; eight times three, 3,600 feet, and she is—it would be about three minutes, roughly three minutes. Roughly, very rough.

Q. Isn't it a fact, captain, that when you are on a course of 118 degrees true and you make a 180-degree (698) turn that you will be back on the reciprocal course of 298 degrees true?

Mr. Flynn: If your Honor please, I don't think the testimony shows that. I think all the testimony in this case shows that the ship made a 270-degree turn, not a 180, and there is a difference.

The Court: Yes. Mr. Kaplow can assume any facts he wishes. If he puts the facts on the basis of an assumption he can obtain the expert's conclusions.

Mr. Flynn: Don't we have to assume the facts in evidence in this case, your Honor, that were testified to?

The Court: He should assume the facts in evidence in this case, and I think all the evidence both from the log and from the mouths of the witnesses would show the turn was 270 degrees and not 180 degrees, and that he turned back—

Mr. Kaplow: May I respectfully read to your Honor the log?

The Court: Yes.

Mr. Kaplow: This is the log of November 15th, the entry at 10:30 A.M.:

"10:30. Entire vessel searched. Man not found. Course altered 180 degrees to 298 degrees. Now (699) searching for Miller. Presumably overboard."

The Court: That doesn't sustain you in saying that there was a turn of 180 degrees. It stated the course is altered 180 degrees. Now, there is a very serious difference between altering a course and following a reverse course and making a type of turn which is what the captain has been talking about.

Mr. Kaplow: May I rephrase my question?

The Court: Yes, please.

By Mr. Kaplow:

Q. Assume, captain, that you are proceeding on a 118-degree true course, and assume further, captain, that you make a turn of 180 degrees; would you then be back on a reciprocal course of 298 degrees? A. You would be back——

Mr. Flynn: I again object.

The Court: I sustain the objection. I sustain the objection on the ground that you are assuming facts for which there is no basis in the record in this case.

Thomas W. Sheridan, for Defendant—Cross.

Mr. Kaplow: If your Honor please, I am asking a hypothetical question of an expert witness; assuming that it is not this particular ship, just a simple problem in navigation.

(700) The Court: It has to have some relevancy and the objection is made that it has no relevancy, and I have sustained the objection.

What you can do, if you are trying to bring out the meaning of that log, you can read the log entry to Captain Sheridan and you can ask him to explain what that means, if you wish, if that is what you are trying to emphasize.

Q. Captain, I should like to read to you the testimony of Captain Wilder, who is the master of the SS. *African Glade,* at page 25:

"Q. What kind of a turn did you make? A. We came around, as near as I can remember, until we came up on our original track. In other words, we didn't just turn 180 degrees, we turned about 270 degrees and then came back to the 298 course."

Now, would you tell us, Captain, whether in your opinion what you have described on this board is the same as what the captain has testified to? A. Yes.

Q. And can you tell me what he refers to in navigational terms when he says "and then came back to the 298 course"? A. He turned to the left; he turned further to the (701) right than was necessary to bring him on the reciprocal course to make up for the transfer due to the turn, and having regained the original track or wake upon which he was on he turned to the left to conform to that course, the reciprocal of the course.

Q. If the seas are moderate—assume, Captain, that the seas were moderate on November 15th—and by the way, what is your definition of a moderate sea? A. Well, moderate sea——

Q. In respect to waves? A. —would be about a wave of about four feet, four or five feet—three to six feet, you might say.

Q. Assume that the seas were moderate; in your opinion how long would a wake be visible? A. Well, in those latitudes, 30 degrees north, I believe it would be visible for three or four miles.

Mr. Flynn: If your Honor please, I wish to call attention that the log shows that at the time this ship was turned around there was a slight southerly swell, not a moderate sea.

The Court: Well, you can bring that out on redirect.

Mr. Flynn: All right.

Q. Captain, would you tell us what the terms (702) written by a watch officer mean, "Slight southerly sea and swell"? A. It would be very slight. That would be the motion of the water and a little bit of a breaking, maybe a little bit of froth on the top of it. Of course it is a general term.

Q. How long would that wake be visible in terms of minutes, the wake which you have described in a moderate sea? A. Well, in those latitudes I should say it would be visible for close to ten minutes, the disturbance in the water.

Q. Even though it would be only for about two or three miles? A. Yes. Your visibility would be not as great as the life of the disturbance in the water.

Q. By the way, does wake move along with bodies that are in the water and ships that are in the water? A. Yes, it moves just the same. Everything moves the same in the water.

Q. Let us approach that for a minute. Everything moves the same if it is in the water. Does the fact that the vessel is going against the current at a speed of 14 knots an hour make a difference in the relative (703) positions

between a free floating body and a moving vessel? A. No. If the current is two knots north and the ship is going fourteen knots south the ship will only go twelve knots south, whereas if she was turning the other way, she would go sixteen knots north and at the same time in the water she would be the same relative distance of her speed through the water, not her speed over the surface of the earth.

Q. Will you explain that, Captain? A. Well, the only thing that affects the relative bearing and distance between two objects in the water is the motions of those two objects, either the motion of one or the motion of both.

Q. Assuming you have a vessel in motion at 14½ knots per hour, and assuming that a body is moving or floating at a speed less than 14½ knots an hour, what effect with respect to their relative positions would the speed of the vessel have? A. For instance, if the ship passed an object at noon and was making 14 knots at one o'clock, it would be 14 miles away from it, irrespective of whatever currents they might be in. Just the course and distance of the ship, if the object stayed still, would be (704) what would affect the two objects.

Q. Would an object stay still in the water? A. Well, a man practically overboard would stay still. A ship——

Q. He might swim a little bit, wouldn't he? A. He might.

Q. Might float? A. Wouldn't swim very far.

Q. If he floated he would be carried by the surface current, wouldn't he? A. If there was a surface—sometimes there is an odd surface current which is not given in the books and you cannot calculate it. He might be carried—the current might affect him in that way a little bit more, but it wouldn't be material in a short time.

Q. If you crossed your wake, which you would have to do in order to make—assume that you had to cross your wake to make a 270-degree turn, and then back again 90 degrees more, do you think your wake would be visible? A. Well, when you cross the wake you would know that you

would be on the reverse course; you wouldn't bother whether it was visible or not. The wake that you went into would probably be destroyed by the new wake, but you would go on reverse course, so you wouldn't need (705) the assistance of the old wake.

Q. I am afraid I don't quite follow you, Captain. If you cross your wake and thereby destroy your wake how can you come back on to your original wake? A. Because you have seen it when you cross it.

Q. You take a guess as to where you are when you come back, is that right? A. No, because in turning——

Q. Please answer my question. Do you take a guess as to where you were after you have crossed the wake? A. No, you don't take a guess. You know. You have lined that up. You have come back on it.

Q. How do you line it up? A. Because you have seen where it is in the water and as you approach it you take the course at reverse course.

Q. And that is assuming that you would take a reverse course, but assume further that a navigator was out, the second mate was standing lookout, and assume that the master was not making any calculations, when did they have time to make an observation? A. Well, the master of a ship knows his ship's capabilities so well that he on the bridge there would hardly need calculations. He knows; he has turned the (706) ship many times. Captain Wilder was used to the ship and he don't need any calculations.

In the Navy where there are intricate maneuvers made they use maneuvering boards and so forth, but in a merchant ship you will get back on the wake as near as is practically possible by the captain's knowledge of the ship, and from the reading of the log I think he did just what was necessary.

Q. Wouldn't a difference of one or two degrees in your course make a difference in where the man was? A. After you have run some time. For instance, if you ran a mile you would be 100 yards out, if you were one degree out.

Thomas W. Sheridan, for Defendant—Cross.

Q. Let us assume that you ran 95 miles. A. 95 miles you would be a mile and a half out, a mile and four-tenths out, but the best thing you could do, though, is take the reverse course. There isn't any other course open to you.

Q. Provided you knew where you were originally. A. You don't need to know where you are originally. You only need to know you are in the ocean and you make the maneuvers necessary to bring yourself back on a reverse course.

Q. Captain, have you studied or had an opportunity (707) to study the smooth log here which gave the noon November 14th position and the noon November 15th position? A. No, I haven't paid any attention to it.

The Court: Mr. Kaplow, if it is convenient I would like to take a short recess.

Mr. Kaplow: Yes, sir.

(Short recess taken.)

By Mr. Kaplow:

Q. Before I get to the smooth log, Captain, I would like you to examine this chart which is a position plotting sheet for this particular maneuver that we are now describing, where the captain turned about on November 15th and ask you whether on the basis of the information that is available to you here you can determine whether this is an accurate portrayal of the maneuver that the captain made.

Mr. Flynn: What paper are we using, please?

A. No. No because——

Mr. Kaplow: The position plotting sheet.

The Court: What is the paper you are using?

Mr. Kaplow: This is a position plotting sheet of the area. It is not in evidence as yet. I want to ask the captain whether he can determine from this

particular plotting sheet—I will use (708) a preliminary question.

Q. Captain, can you tell us whether this is a correct position plotting sheet for the area that we are describing on November 15, 1950? A. I forget what the latitude and longitude was, though it does not make any difference. That seems to be——

Q. Can you check the latitude and longitude, sir, and tell me——

The Court: You said it seems to be what, Captain?

The Witness: It is an official plotting sheet and if that is the correct latitude, that is the plotting sheet of that latitude.

Q. Whether it is the correct latitude or whether it is another particular portion, the plotting sheet would show the relative positions of the vessel on that plotting sheet, wouldn't it? In other words, this plotting sheet is a magnified section of the larger navigational chart, isn't it? A. Yes, but this isn't—this is by no means a plot of what the ship did, as far as I can remember.

Q. Well, my first question is, is this a position plotting sheet which is a magnified area of the navigational chart? (709) A. Yes.

Mr. Kaplow: I ask that it be marked in evidence.

The Court: Any objection?

Mr. Flynn: I have no objection to its being used as a position plotting sheet. I object to any markings made on it.

The Court: Let me see it.

I will allow it be marked with the understanding that this is solely used for graphic purposes, for the purpose of illustrating questions and answers which Mr. Kaplow wants to put to the witness.

Thomas W. Sheridan, for Defendant—Cross.

Mr. Flynn: That is agreeable for that purpose.

Mr. Kaplow: At this time, your Honor, and then may I——

Mr. Flynn: That is all it involves.

Mr. Kaplow: At this particular time. May I have the opportunity later to qualify this plotting sheet further in accordance with the testimony?

The Court: Well, what happens later will happen later. All I can pass on is what is happening now and I have made a reservation with respect to the use of this paper now.

(Marked Plaintiff's Exhibit 38 in evidence.)

(710) Q. Now, Captain, I show you Plaintiff's Exhibit 38 which is a position plotting sheet, and on there you will see a graphic illustration of the position that the master placed the vessel in commencing on November 15th at 10:30 A. M.

In your opinion, Captain, is this an accurate portrayal, based upon the documentary proof that we have here and the testimony of the captain; is this an accurate portrayal of the maneuver? A. No, no, no.

Q. Well, can you—A. In my opinion I don't know what the actual operation was in detail because in the log book you only put the overall of what you did. You turned 270 degrees. You might have turned rapidly; you might have turned slowly; you might have gone across the wake and come back to it, or you might have gradually converged with the wake. I don't know because those things are not entered in a log book. You don't put the—in the case of a man being overboard, you don't stop for minute literary efforts. You just do the thing and get it down roughly.

Q. That is with respect to the log book itself? A. Yes.

Q. Now, with respect to the captain's testimony do (711) you recall the testimony that I read to you concerning

what the captain did? A. He turned 270 degrees but he didn't go into detail as to what he did after that, and turned into the wake.

Q. May I re-read it to refresh your recollection, sir, so I will be able to base my next questions to you on testimony.

At page 25:

"Q. What kind of a turn did you make? A. We came around, as near as I can remember, until we came up on our original track. In other words, we didn't just turn 180 degrees, we turned about 270 degrees and then came back to the 298 course."

A. That is exactly what I said, and that is the right thing to do. He doesn't go into detail as to what he did. He gradually converged with the opposite of the course. This thing here doesn't show that. I couldn't say how near right this is at all.

Q. On the basis of the information that we have you couldn't say that this portrayal of the courses that were taken is accurate? A. No, I don't think it is.

(712) By the Court:

Q. This shows exact concentric circles, doesn't it? A. Yes.

Q. And you say that there is no basis upon which you can say that he was able to put his ship in an exact concentric circle to get back on the 298-degree course? A. That's right, or that he would do it.

Q. Or that he would do it. A. No. His judgment would tell him what to do.

Q. So in your opinion this is not an accurate portrayal of what the captain said? A. No.

By Mr. Kaplow:

Q. Captain, in making a turn of 270 degrees with a C-2 at that particular portion of the ocean do you know what rudder you would use? A. What I would use?

Thomas W. Sheridan, for Defendant—Cross.

Q. Yes. A. I would probably use hard over, but I might not. I might use—I think in those weather conditions I would use hard over.

Q. How are the points of a rudder classified? A. In degrees.

Q. And what does hard over equal? (713) A. It is about, on one of the *C-2s* it is about 35 degrees, 30 to 35 degrees.

Q. And assuming the *C-2* was loaded with cargo, in your opinion would you make a 35-degree turn? A. Not a 35.

Q. If you were the master of this vessel? A. Not a 35-degree turn. You might put a 35-degree rudder on her.

Q. Would you use a 35-degree rudder? A. I probably would ease it on as we swung. I wouldn't put it on right away, but I would ease it on, depending upon the weather conditions and so forth.

Q. You would want to avoid the danger of capsizing, wouldn't you? A. No, there is no danger of capsizing.

Q. You wouldn't? A. No.

Q. Captain, what is the usual maneuver procedure at sea in order to make a reciprocal turn, a turn to come to a reciprocal course? A. Well, if you just want to make a reciprocal course you put the rudder over to the angle you have determined. As to how quick you want to do it, if you want to do it with maximum speed, you put the rudder (714) hard over. Then you turn around till you come to the reciprocal course. If that is all you want to do.

Q. Would you put a marker out? A. No, because you would be past the marker by the time you got back. You would pass the marker on your starboard to port beam.

Q. Isn't it usual to drop a marker overboard in order to make your turn? A. No, no.

Q. Now, Captain, assuming that you were the master of the African Glade and at 10:30 A. M. on November 15th it was reported to you—at 10:20 A. M. it was reported to you that a man was presumably overboard, what steps

would you take? A. If it was reported that the man was overboard, why, I would make the turn and go back, but if it was reported that the man had not turned up, I would search the ship first.

Q. Well, assuming that part of the search had been made by the man's supervisor and that there was a feeling or a presumption that the man had disappeared overboard and was not on the vessel, what would you do? A. I would make a turn and go back over the reverse course in the wake that I had been in.

(715) Q. What else would you do? A. Well, I would probably radio—if there was a Coast Guard vessel there, I would radio them.

Q. What else would you do? A. That's about all. I would be concentrating on picking the man up.

Q. Would you have your navigating officer performing any functions for you during this search? A. No. I would use him for lookout, too. I would watch the ship.

Q. It wouldn't matter what your position was, then, I take it? A. Not at all.

Q. Wouldn't it be important, Captain, to have your navigating officer take a fix to try to find your position? A. It is always important to do that, but at that time all he could do is get one line.

Q. Why do you say that? A. Because the only possible object you could get at that time would be the sun.

Q. And on what do you base your opinion, Captain? A. From what I have heard of the testimony and the fact that I know that the planet—for instance, Venus is about the only planet you could get—when the (716) sky is very clear, Venus is too close to the sun at that time, and with a cloudy atmosphere or even slightly obscured you can't get anything else.

Q. Isn't it a fact that in weather terminology the degree of cloudiness is determined in ten parts? A. Yes.

Q. What does partly cloudy mean? A. That is a term, partly cloudy would be probably half to three-quarters of the sky covered with clouds.

Q. Isn't that usually six points of the ten, up to six points of the ten? A. More or less.

Q. And with up to six points of the ten isn't it possible and probable that you could take fixes of heavenly bodies? A. Only the sun. You might get the sun as it came out, but the other bodies you have to have a very, very clear, bright sky to get Venus, and the others you only get near, as the sun gets nearer to sunset.

Q. Incidentally, how long does it take to take a fix with your sextant? A. It takes about a half minute or a minute, according to—it doesn't take long.

Q. It would take a little less than that, (717) wouldn't it? A. A little less.

Q. It is almost instantaneous, as soon as you see it, if you are observing it? A. You have got to bring it down, make a good contact. If the sun isn't out, you have got to wait until it comes out.

Q. And in a partly cloudy sky the sun is out at some time? A. At some time.

Q. Can you take a fix in an overcast sky? A. Not if you can't see the sun or a body.

Q. Doesn't the sun come out sometimes in overcast skies? A. It might come out sometimes, yes.

Q. And if you were a master concerned with finding a man, wouldn't you use every possible precaution and every possible means of knowledge to learn where you were or where you are at the time you are making your search? Don't you think it is important, Captain, for the master to do that? A. No, that is immaterial as far as——

Q. Oh? A. Because you are searching for the man in the (718) sea, and if the ship's position is in doubt, the man's position is in doubt to the same amount. As I have said before, it is the relative movements of the two objects, not anything else.

Q. With the sun you can get one line of position, can't you? A. Yes.

Thomas W. Sheridan, for Defendant—Cross.

Q. And you can determine the position of your vessel by taking another line on the sun. Assuming that there are no other heavenly bodies that you can take a fix on, you can determine the position of the vessel, can't you, by taking a second line on the sun, can't you? A. When it has materially changed in azimuth. There must be a period of time.

Q. By "material" you mean about ten degrees? A. Oh, it is much more than that. You wouldn't get a near accurate fix with less than a 45-degree change of bearing.

Q. About how long would that take as the sun travels in the sky? A. That time of day it would be a couple of hours. I would have to look it up. You can look it up in the azimuth tables.

Q. You could obtain your position by 10-degree (719) difference in the sun's movement, couldn't you? A. No.

Q. You couldn't do it at all? A. With the personal equation and the variations you would make one or two—one minute is about as close as you can get in an accurate observation, and with a 10-degree convergence you would have a doubtful area of pretty near five or ten miles. I would have to draw it out.

Q. Wouldn't you want to find or locate your ship as nearly as possible on an accurate course that you were trying to retrace? A. No, because all you would need to do is retrace the opposite of the course that you had been pursuing. The actual position of the ship would be immaterial.

Q. Wouldn't it be material, Captain, if you had known your position at noon time and were able to calculate it and found that you had been making a course good of 120 when you were steering a 118 degrees true; wouldn't it make a difference? A. Not as far as picking up this man, it makes no difference. If you were five degrees out in your gyro compass, for instance, supposing—which wasn't true, but supposing you had been five degrees out on your gyro (720) compass or the current had affected you five degrees, it would have no effect as long as you went on the reciprocal

course, because the same influences that cause that error would affect all objects, both objects concerned.

Q. What is a parallel course, Captain? A. Well, a parallel course is the course that you take, a reverse parallel course, if you don't converge back on the——

Q. In other words, you could be coming 118 degrees true? A. And another ship 118 degrees would be on a parallel course.

Q. Another ship would be coming on a 118 degrees true, and he could be 11, 14 miles away from you? A. Yes.

Q. That would be a parallel course. A. Yes.

Q. And likewise, if you turned your ship about and were doing 298 degrees true, you would be on a parallel course with the 118 degrees, not necessarily on a reciprocal course; isn't that true? A. No, because you would have to converge as the (721) captain did.

Q. How do you know the captain converged? A. Well, according to the evidence in your questioning he made a 270-degree turn until he saw his wake and regained his wake. He could do that either by calculation in his head, as a man knowing his ship, or by looking in the water and seeing the wake and gradually converging into it.

Q. Of course in your answer you are assuming that the captain actually did— A. What he said he did.

Q. —come to his wake.

Mr. Flynn: If your Honor please, that is the only testimony in the case.

The Court: Well, you have got the testimony of Ware, haven't you?

Mr. Flynn: Yes, sir.

The Court: Well, that is not the only testimony in the case. I don't understand your objection. Why are you objecting?

By Mr. Kaplow:

Q. Let us get to this smooth log book, Captain, and I ask you whether you can tell us what the noon position of

the 14th of November and the noon position (722) of the 15th of November is? A. The 14th was 34.02 north, 49.37 west, and the 15th was 31.40 north, 44.45 west.

Q. Now, assume, Captain, that these positions are dead reckoning positions, and assume that you are about to make a search for a man overboard; would you then try to get an accurate position or a true position of where you were? A. Not for the search purposes. I would always try to keep the position of the ship in mind and try to have it, but not conducting this search.

Q. Now, on the basis of the log entries in the remarks column of November 15th, Captain, in your opinion could fixes have been taken on celestial bodies or the sun? A. Well, it is my opinion that at all times, especially near port—out at sea here it is not material for safety—positions should be taken. I mean to say you should keep the position of the ship as accurately as possible. That is a fundamental.

Q. Getting to November 15th, based upon the entries in the log by the watch officers, in your opinion— A. What entries?

Q. The entries in the remarks column, Captain. (723) A. Which ones?

Q. For the period commencing at 6 A. M. or at 8 A. M., and going on through 5:16 P. M., which was when the search was ended, on the basis of these entries in the log would you say that it was reasonably probable that the navigating officer could have taken his fixes? A. He probably could have.

Q. Now, Captain, assuming that the African Glade was steaming at 14½ knots an hour from 11:30 P. M. on November 14th until 10:30 A. M. on November 15th, can you tell us how far she would have steamed in miles? A. I can figure it out. It is the number of hours lapsed times 14 and a half.

Q. Would you want to do that for us, Captain, please? A. Give me a piece of paper.

Thomas W. Sheridan, for Defendant—Cross.

The Court: Here.
The Witness: Thank you.—

A. What is the time in the morning?

Q. 10:30 A. M. on the 15th, from 11:30 P. M. the night before, and I wish you would take into account, Captain, the entries—A. 10:30 P. M.?

Q. —on November 14th—no, from 11:30 P. M. on November 14th to 10:30 A. M. on November 15th, and I (724) refer you, Captain, to the entry in the log of 6 A. M., November 14th, at which time they advanced the clocks one hour.

I wish you would take that into consideration in your calculation. A. 22 hours.

Q. How many hours would that be in lapsed time? A. 22 hours.

Q. From 11:30 P. M. to 10:30 A. M.? A. Oh—yes, because that is one hour out for the clock advanced.

Q. How many hours would it be? A. 22 hours.

Q. 22 hours from 11:30 P. M.— A. 11:30 P. M.

Q. —until 10:30 A. M. the next morning? A. Oh, yes, I see what you mean, yes. That would be ten hours. That would be 145 miles.

Q. Now, how many miles would he have made from 10:30 A. M. until 5:16 P. M. at 14½ knots per hour? A. About 113 roughly.

Q. So that the difference between those two is what, Captain? A. Between—what was the other one I gave you? (725) 145 I think.

The Court: Yes, ten hours at 145.

A. 32.

Q. Now, Captain, in making a prudent search——

Mr. Kaplow: Oh, withdrawn.

Q. Is it definitely a fact that the captain did not return to the point where the man was last seen alive? A. I believe it is.

Thomas W. Sheridan, for Defendant—Cross.

Q. In your opinion, as a competent and prudent master, should Captain Wilder have returned to the point where the man was last seen in order to make an efficient search? A. No.

Q. There is no question that the master did not return to the approximate area where this man was last seen? A. I don't believe there is any question of that.

Mr. Kaplow: May I have just a moment, your Honor? Before I complete this cross-examination?

The Court: Yes.

Mr. Kaplow: Just one further question, Captain.

Q. When we speak of wind, the direction of wind, what do we mean? A. The way—the place where it is coming from, the direction it is coming from.

(726) Q. And when we speak of current or set of the sea, what do we mean? A. The direction it is going.

Q. So that a southerly sea would mean that the current or the set of the ocean was going in a southerly direction, is that correct? A. Not necessarily. The sea and the current are different things.

Q. Will you tell us what the sea is? A. The sea may be—a swell might be going right against the current. The direction the swell is moving is a different thing from the direction of the current. As a matter of fact, a wave in the water is merely a vertical oscillation, up and down. It passes without displacing water very much except right at the fringe of the top where it breaks, and that can go against the current or with the current or across the current.

Q. Now, assuming a southerly sea, would that have any bearing on the movement of a body in the water? A. It might.

Q. If it was against the current? A. You couldn't calculate what it would be and it wouldn't be.

Mr. Kaplow: No further questions.

Thomas W. Sheridan, for Defendant—Re-direct.

(727) *Re-direct examination by Mr. Flynn:*

Q. What would the master have done if he had got a 10:30 fix on the morning of the 15th? A. He would put it down in the books but it wouldn't have had any other effect on his actions.

Q. Well, supposing he had taken that 10:30 fix and had attempted to chart a course back to where Miller went overboard; what would you say to that? A. It would be useless. It wouldn't have any effect on it.

Q. Isn't is true, Captain, that unless that course that he charted back from the fix was the course, the same as his wake, that it would have been an error? A. Surely.

Q. Is there any doubt about that? A. No doubt at all.

Q. It was brought out, Captain, that the ship steamed back until darkness or until darkness set in, which was about 5:16, and that was some, I believe you computed it, some 32 miles short of the distance that the ship had traversed since 11:30 the night before. A. Yes.

Q. Now, Captain, if you were the master of the vessel, what would you have done at 5:16 when darkness (728) set in? A. I would have resumed my course on to my destination. I would have given up the search.

Q. Will you explain why you would not have gone back the additional 32 miles? A. Well, to attempt the search, as I said before, with the lights, with the visibility of only 100 feet, if you did reach the man you would kill him because you would overrun him, but the possibility is so beyond the limits of possibility I'd say that you could, making a narrow band of 200 feet through the water, you could pick up a man in the vast wastes of the sea.

And another thing, it is a very dangerous thing because the rules of the road I think have a special thing ordering you not to have lights not required for the navigation of the ship, because you would be blinding your lookouts, and liable to have a worse catastrophe than the loss of one man by a collision.

Q. Well, actually, Captain, considering your war experience, actually lights would impede your seeing out over the water, would it not? A. Absolutely, absolutely.

Q. Isn't it also true from your war experience that as a watch officer if you come out of a lighted room (729) on to the bridge at night that it is 20 minutes before you can see? A. Easily that. Easily that.

Q. In other words, you have to get what is called night vision. A. Night vision.

Q. Well, Captain, couldn't the master have heaved to and lay in the water and resumed his search at daylight, which would have been about 6:30 the next morning? A. He could, but the possibility of the most vigorous man surviving that time is outside of human probability. He could have done it.

Q. Captain, as a convoy commodore did you have any experience of men falling overboard merchant ships? A. We had men fall over.

Q. And what is your experience about the recovery of those men, even in daylight? A. Even in daylight you lost more than you got. Once in awhile a destroyer would pick up a man.

Q. How long after the man had fallen overboard? A. Within half an hour or an hour or so; within that time; mostly within 10 or 15 minutes. The average man, even a good swimmer, in the water alone, in the surging sea does not last very long.

(730) Mr. Flynn: That is all.

Recross examination

By Mr. Kaplow:

Q. Captain, it is true if you had one line of fix on the sun at 10:30 A. M. it would not be sufficient to enable you to place the vessel as to where it was; there is no question about that, is there, that if you only had one line— A. That's right.

Q. There is no question that you would know where you were on the line, but you wouldn't know where your position was of the vessel on the sea? A. No.

Q. Now, if you waited awhile on a partly cloudy day you could then take another sight on the sun or take another position from the sun, couldn't you? A. If you waited long enough to get a change in azimuth, as it is called, a change in bearing.

Q. Then how long would you have to wait? A. I would have to look at the azimuth tables in the almanac to tell you.

Q. Please do. A. Do you have an azimuth table there?

Q. I show you now Defendant's Exhibit D for (731) identification, which is the American Nautical Almanac for the year 1950. A. Now, give me the azimuth table. I could only give a guess from this. You have to have the azimuth tables to tell. With the declination of 18 degrees south and a latitude of 31 degrees north it would be an hour or two before the sun would change sufficiently in azimuth to get a good sight.

Q. And this was starting at 10:30 in the morning. Darkness did not set in until 5:16 in the afternoon, did it? A. No. And then again depending on whether you could get the sight with the cloudiness, that is another thing.

Q. In partly cloudy you have told us you can get a sight on the sun. A. You might. The cloudiness might obscure the sun. Partly cloudy might mean it was bright in one place, but not where the sun was.

Q. But certainly you could reasonably expect to try to get another fix in the afternoon, so that you would have two lines of position from the sun. You would then know where your bearing was, and if you never even attempted it, would you call that an efficient search? (732) A. Well, at that position, the exact position in the sea being of very little importance, I wouldn't place much stress on it. As

a matter of routine, I always have positions in the morning, at noon and then in the night, at evening.

Q. It is more than routine in an emergency, isn't it? A. There was no emergency having anything to do with the position.

Q. May I finish, please? It is more than a routine matter in an emergency, isn't it? A. Not in an emergency of this nature. It has no effect on it.

Q. Was this an emergency? A. It was an emergency of a different nature.

Q. A man reported to you disappeared over the side? A. It is an emergency, yes, but of a different nature. Nothing to do with the position, geographical position of the ship.

Q. By the way, would night vision affect men who were constantly on lookout? A. Yes, if they went in and got the glare of the light.

Q. Let's assume they are constantly on lookout—— A. Yes, it would.

(733) Q. —which is what the testimony is here. A. Yes, they would. They would not be able to see through; their vision would be restricted to the band of light. If they tried to look out into the darkness, they would be blind.

Q. But this night vision wouldn't affect them any, would it, if they had been out there all the time? A. It wouldn't matter a darn if they were up against the light. The light was what obscures their vision. It dilutes their pupils.

Mr. Kaplow: That is all, Captain.

Re-direct examination by Mr. Flynn:

Q. Captain, if the master had taken a fix at 10:30 that morning would it have been possible for him to have charted a course from that fix which would have taken him back through his wake? A. No, no better than what he did.

Q. In other words, if he charted a course from a fix it would have been a different course back through the water

than the course of going back through the wake? A. It might be if it disagreed with the dead reckoning, but it wouldn't make any difference.

Q. Well, understand my question. If he charted a course from the fix, wouldn't it have been impossible (734) to have charted that course so that it would have taken him right back through his wake? A. I believe it would, yes.

Q. Well, to have charted a course from a fix he would have had to have made minute calculations as to current, wind; wouldn't he? A. Well, not from a fix, if he got a simultaneous fix, but if he got a fix from two sights of the same object he would have to make allowance for the diverging elements in between. But a fix would have no material bearing upon picking up the man.

Q. In other words, he couldn't use the fix as far as going back in his own wake? A. Not at all. It has no practical bearing at all.

Q. In other words, as far as this situation is concerned, there would have been no purpose in obtaining a geographical fix? A. No purpose at all.

Mr. Flynn: That is all.

By the Court:

Q. Captain, I am afraid I have to ask you one or two questions. A. Yes, sir.

Q. Do you know whether the speed of 14½ knots (735) an hour represents the maximum feasible speed at which a loaded vessel of this type can travel? A. It is a little bit more than that. I think, but I am not certain, it is about 15½, about 16 knots maximum, I think.

Q. Then I take it that you have no information as to what the maximum possible speed of this ship might have been? A. No, I haven't. I have had them in convoys which is generally a speed slower, as slow as the slowest ships.

Q. Slower than 14½? A. Yes.

Thomas W. Sheridan, for Defendant—Re-direct.

Q. And your best estimate would be, based upon your knowledge and experience with this type of vessel, that it could not have exceeded 16 knots under the most favorable circumstances with a load? A. That's right; no.

Q. Is that right? A. That's right.

Q. Did I understand you to say that on the basis of this calculation of speed, time, multiplied by the period of time elapsed, that you are quite certain that Captain Wilder did not put his ship back at the place where (736) the man was last seen, where James W. Miller was last seen? A. That's right.

Q. Well, now, when you say that you mean where James W. Miller was last seen on the ship. A. On the ship.

Q. You don't know where he was, when he was brought into contact with the surface of the ocean? A. No, I don't know.

Q. Assuming, in line with that questioning, that James W. Miller fell into the ocean two hours approximately after 11:30 or subsequent to two hours after 11:30, then the ship would have traversed or reached the place where he hit the water, is that right? A. Yes, sir.

Q. So that it is only on the assumption that James W. Miller came into contact with the ocean between 11:30 and 1:30 approximately that theoretically the ship would not have reached the place where he last hit the water? A. That's right, sir.

Q. Your answers, as I understand it, are based upon where he was last seen on the ship, is that right? A. Yes, sir.

(737) Q. Well, now, there has been testimony in this case to the effect that it would have been prudent for a searching master under the circumstances of this case to have followed a zig-zag course on the return.

What in your opinion would have been proper for the master of this ship, assuming that he had abandoned the search and was returning to the point of his destination; would it have been prudent for him to follow the zig-zag course or not to have followed a zig-zag course? A. It

wouldn't be prudent because by the time he was turning back he was in the dark——

Q. Speak to the jury. A. By the time he was turning back he was in the darkness, and to be zig-zagging in the dark, with lights lit, and a blind ship, it would be a menace to other ships in the vicinity and to yourself in case you come on another ship, so that the zig-zag expedient wouldn't be—especially if you had the lights, would be a very dangerous thing to do.

Q. In your opinion would a radio signal to an accessible Coast Guard vessel be sufficient or do you feel that you should, as a prudent master of the ship under these circumstances, have given other and different orders to the radio operator? (738) A. No, I think that having communicated with the Coast Guard ship, knowing that the major mission of the Coast Guard is lifesaving, and anything else, the weather function is subordinate to that, he would take charge of the overall radio signalling and telling the other ships in the vicinity.

Q. There has also been some testimony to the effect that assuming, of course, radio communication with the home office was feasible, and apparently it was in this case, that a radio communication with the home office should have been made at the time when the decision for discontinuance of the search was eminent. A. No, sir.

Q. Why? A. Because a man sitting in an office thousands of miles away has no knowledge of the immediate conditions, and if the office wanted to give the captain any instructions or anything, they would have done it. They left it to him. He is the man in command. He is the man on the scene, and to expect that a man thousands of miles away could substitute his judgment for the man on the scene is, I think, absurd.

The Court: May I have that picture of the vessel?

Thomas W. Sheridan, for Defendant—Re-direct.

(739) By the Court:

Q. Captain, you have testified at one point during your testimony this morning about the destruction of the wake, that when the vessel makes a turn and heads back on a reverse course the wake is destroyed.

Now I am referring my questions to that portion of your testimony. Will you point to the part of the vessel on which the captain is normally situated when the vessel is engaged in maneuvers of any kind, and particularly a turn. A. Up here either in the top of the wheelhouse or in the wheelhouse itself, right up there.

Q. All right. That is just forward of the stack? A. That is the bridge. That is the navigating center of the ship.

Q. Where is the flying bridge? A. The flying bridge is above that.

Q. So that he would either be on the bridge here, which is the covered bridge, or the flying bridge, but more likely in the covered bridge. A. He might be on the flying bridge.

Q. When he is looking forward, over the bow of the vessel, if you were to draw a line between his eyes and the surface of the sea, would you hit a point forward of (740) the bow? A. Yes, you would hit a point, about half of the beam of the ship would be a line that would extend forward, that you wouldn't be able to see the sea, itself, probably. Let me see.

Q. The beam of the ship here I understand is approximately 63 feet. A. Yes.

Q. Assuming the beam to be 63 feet— A. He would be about up here. It narrows down. So he looking forward there would look down into the sea to where the line from the bridge, on which he was standing, hit the sea, which would be some distance ahead of the ship.

Q. Would you try to point it out with this pencil against this Exhibit 2? A. A man standing up here would look out here and he would look down a line there (indicating)

and the ship narrows there; you cannot see it because it is a profile. The ship narrows, and there would be a point down here where he couldn't see the water until after it got under the bow of the ship itself. The bow of the ship itself would obstruct his vision for a short distance ahead.

(741) Q. That leads me to my next question. What is it that destroys the wake? What action of the maneuvering vessel destroys its wake on a turn or when it tries to converge? A. It doesn't unless it goes into the wake.

Q. Assuming it goes into the wake—I am assuming that. I am assuming that the ship has taken a turn and has converged with its own wake so that it puts its bow into its wake on a reverse course. What is it that destroys the wake? A. It only destroys the wake as it overtakes it, as it retakes it.

Q. Is it the contact of the bow or is it the action of the propeller or both? A. The movement of the ship through the water, the bow, the impact of the bow on the waves, and the tumult caused by the propeller.

Q. So that you would say it is a combination of the action of the bow and the tumult created in the water by the propeller which would destroy the wake, assuming of course the turn and the taking of a reverse course within its wake. A. Yes.

Q. Does it follow from that that assuming that the (742) wake were visible that the view of the captain on that wake would be an unobstructed view of a visible wake in advance of its being destroyed? A. Yes, sir, because he would just turn his bow one side and get a view right from the wing of the bridge. He could look down on either side. See what I mean?

Q. In other words, he would see the wake before it could be destroyed by a ship, is that right? A. Yes.

Q. Now, you have talked about the effect of current and the relative position of objects on the surface of the ocean affected by a current.

Do you think that a fair comparison would be a tray upon which objects might be placed, and the movement of that tray carries with it the movement of all the objects on top of the tray? A. Exactly so.

Q. And unless these objects are moved around they remain in the same relative position? A. That is exactly so, sir. Exactly.

The Court: I have no further questions.

Re-cross examination by Mr. Kaplow:

Q. Captain, if the master crossed his wake and then—assuming that the master crossed his wake, in (743) making a 270-degree turn, and in coming back, would he not have destroyed his wake in front of him? A. The part that he crossed, but the part that remained on his port side, if he were making a right turn, would still be visible to him.

Q. Now, in the time that was consumed in this maneuver, can you state with any degree of certainty that the wake still existed when the captain made his turn? A. I believe it would, knowing those latitudes, but I can't state anything with certainty. I wasn't there.

Mr. Kaplow: No further questions.

Re-direct examination by Mr. Flynn:

Q. Captain, you were a convoy commodore in the war? A. Yes, sir.

Q. Isn't it true, Captain, that submarines during the war followed the wakes of ships for miles and the submarines could not be seen?

Mr. Kaplow: If your Honor please——

Mr. Flynn: I am bringing out a matter of general knowledge, Judge.

The Court: I think we are a little too far afield, Mr. Flynn. I think it is irrelevant.

Thomas W. Sheridan, for Defendant—Re-direct.

Unless Captain Sheridan can testify with respect to his particular observation of wakes in this (744) general latitude, this portion of the Atlantic, I don't think I would permit him to testify.

Q. Were you in this portion of the Atlantic during the war? A. No, not during the last one. The first World War I was. I was out in the South Pacific during the last.

The Court: You were in this area of the ocean during World War I?

The Witness: Yes, sir.

The Court: I will permit you to put proper questions with respect to that portion of the ocean.

The Witness: And at various times during my career.

Q. All right, Captain, that portion of the ocean, isn't it true that submarines could follow a wake of a ship for miles and the sub was not in sight of the ship?

Mr. Kaplow: If your Honor please, I object to the question on the ground it is immaterial and irrelevant in this case. I mean you are assuming facts that are not in this case at all.

The Court: I think we are, Mr. Flynn. I think you will have to stand on Captain Sheridan's statement as an expert, and he has now added his own familiarity (745) under submarine warfare conditions with this portion of the ocean, his statement that a wake could be seen for several miles, depending upon the condition of the surface of the ocean.

I think he has so stated and I think you will have to rest on that.

Mr. Flynn: All right, sir, that is all.

Mr. Kaplow: No further questions.

The Court: Thank you.

(Witness excused.)

Charles E. Umstead, for Defendant—Direct.

CHARLES E. UMSTEAD, called as a witness, having been first duly sworn, testified as follows:

Direct examination by Mr. Flynn:

Q. Captain, where are you employed at the present time? A. I am principal of the Merchant Marine School at Seamen's Church Institute.

Q. Where? A. Seamen's Church Institute.

Q. And how long have you been principal of such school? A. Ten years come the first of the year.

Q. And what are your duties as principal of such (746) school? A. First of all direct the overall activities of the school; secondly I also handle the deck department in its entirety.

Q. Do you teach? A. Oh, yes, yes.

Q. And what subjects do you teach? A. I teach all subjects pertaining to seafaring life and the deck department.

Q. Do you hold a class of instruction for men who desire to become third mates? A. Yes, sir.

Q. Second mates? A. Yes, sir.

Q. Chief mates? A. Yes, sir.

Q. And master? A. Yes, sir.

Q. And how long have you been doing that? A. Ten years the 13th of this month.

Q. Captain, when did you first go to sea? A. Either in 1923 or '24. I am not sure which.

Q. How old were you then? A. Oh, 17.

(747) Q. How old were you when you first went to sea? A. 16 or 17.

Mr. Flynn: All right, I will withdraw the question.

Q. How long did you go to sea—what did you go to sea as; what was your capacity when you first went to sea? A. I was a mess boy in a coastwise towboat.

Charles E. Umstead, for Defendant—Direct.

Q. And when did you first go to sea as a merchant seaman or for merchant ships? A. I became a deck man, sir, a month after I had the mess boy job which was much better, and I continued going on from there on in.

Q. Your father was a merchant seaman? A. My father was skipper of the first boat I was employed on.

Q. He was? A. Yes.

Q. In what capacity after your first ship did you go to sea? A. Mostly able body seaman until about the year 1930 when I got my first license.

Q. What was your first license, Captain? A. Third mate of oceans unlimited.

Q. Where did you sail under your third mate's (748) ticket? A. Oh, Europe, Mediterranean, South Africa, intercoastal.

Q. How long did you go to sea from 1930 on? A. From 1930 on?

Q. When you first got your third mate's license. A. Oh, there's a period of time in the '30s when there were no jobs but practically continuously from 1930 on to 1943 I believe.

Q. When did you become a second mate, Captain? A. If I recall rightly, in 1935. Oh, no; oh, no. 1935—yes, that's correct.

Q. And when did you become a chief mate? A. Never did hold an unlimited chief mate's license.

Q. When did you become a master? A. August 1, 1942.

Q. What was your service during the war as regards merchant ships? A. Well, the early part of the war I had command of the *Berkshire,* maritime training service ship. I left there and went to the Army Transport. I was chief officer. I was with them—oh, I have the dates over there. I can't recall them now. Probably a year, (749) seafaring. Then I came—then I was brought ashore and assigned to what they call a harbor boat as master of the harbor boat delivery pool. After that, another

period of time, probably a year I became assistant marine superintendent.

Q. What type of merchant ship were you on during the war? A. On all fast Army Transports. That is offshore.

Q. Pardon? A. That is offshore, where we were running foreign.

Q. Where did you go on this Army Transport? A. One trip we made, Bizerte, North Africa, back to New York; another trip we went to Liverpool, Glascow, Freetown in West Africa, several ports in South Africa. Return to Rio, back to New York.

Q. Captain, did you suffer disability during the invasion of North Africa? A. I suffered a heart condition during that time.

Q. And that is why you do not go to sea? A. Correct.

Q. For the past ten years you have been principal of the school conducted by the Seamen's Church Institute? A. Not quite. I mark my tenth anniversary about the first of the year.

(750) Q. During this period of ten years you have been engaged in the teaching of navigation, is that so? A. That is correct.

Q. Continuously? A. Continuously.

Q. Captain, assuming that the SS. *African Glade,* a C-2 cargo ship, left New York on November 10, 1950, that she took leave from Ambrose Light at 11 o'clock on a course of 106 degrees, that she then changed course by gyro to 112 degrees, and that on November 14th at noon she again changed gyro course to 118 degrees; assuming further, Captain, that at some time subsequent to 11:30 on the night of November 14th that a man had gone overboard from the vessel; that at 10:20 A. M. on the 15th this disappearance from the vessel was reported to the master; that the master then turned the ship about on a 270-degree turn; that he came back and took a turn into his own wake which was actually visible; that he then

took a reverse course in his own wake of 298 degrees; that he pursued that course of 298 degrees; that immediately upon being advised a man had disappeared from the ship that he had called all department heads and had a search made of the entire vessel; that he had posted lookouts on the bow, on the flying bridge and various other parts of the ship with (751) binoculars; that he continued on this reverse course of 298 degrees until darkness set in at 5:16; that not having found the man who had disappeared, that at 5:16 he resumed his original course; in your opinion, Captain, did he follow a correct navigational and seamanlike procedure in what he did from the time he was advised of the man's disappearance? A. I do, sir.

Q. Will you explain your reasons? A. Well, the basic reason here, he made the proper turn, absolutely no question about that, to return to his wake, which under the circumstances is the only thing possible.

Q. Now, Captain, will you tell us, or if you would like to illustrate on the board——

The Court: I think it is time to adjourn for lunch, Mr. Flynn. I am sorry to interrupt you.

Mr. Flynn: Quite all right, sir.

The Court: We will stand recessed until 2:15, ladies and gentlemen.

(Whereupon the jury left the courtroom.)

(Luncheon recess until 2:15 P. M.)

Charles E. Umstead, for Defendant—Direct.

(752) AFTERNOON SESSION.

2:15 P. M.

(Jury returned to the court room.)

CHARLES E. UMSTEAD, resumed.

Direct examination by Mr. Flynn: (continued)

Q. Captain Umstead, when we adjourned for lunch I believe that I asked you to show us on the blackboard what the captain did when he made a 270-degree turn to come back in his wake, and on a reverse course. Would you do that?

(Witness at the blackboard.)

A. Assuming this to be the course of the vessel——

Q. That is 118 degrees? A. 118 degrees, that's right. When he made this turn, and it was to the right, I believe, he would come around in a circle similar to this, and at 170 degrees he would be approximately in this position. He would have to continue a slight distance further, veer this way and come back on to his track, in the wake, I mean.

Q. And assuming, further, that he then went on a course of 298 degrees would that have taken him back in the actual wake through the water that he had been following? A. Yes, as long as he returned——

(753) Q. Will you speak louder, please? A. As long as he returned in his wake he would at all times be heading towards the man's position when he was last gone overboard. Furthermore, at any time that that man should by reason of current drift this way, the vessel similarly would be drifting that way, too, so it would always be pointing towards his direction.

Q. How about the effect of the wind? A. Negligible in this case.

Q. Well, would the wind have affected the ship any different on the course of 118 degrees than it did on the reverse course of 298? A. No difference at all.

Q. And what about current, Captain? A. The current would be the same in all cases. If the current had set the vessel this way, it would also set the man this way. If it had set it that way, it would also set the man that way; it would also set the ship that way.

Q. Captain, of what significance would the geographical position, the position of the ship on the ground below the water, what significance would that have been in this situation? A. In a maneuver of this sort absolutely none (754) whatsoever.

Q. What could the captain have done with such a fix or position? A. Well, as far as the maneuver, returning to find the man, it would be of no use to him at all. Any other reason, I don't know why he should have.

Q. Captain, let me ask you this: In your opinion, from a navigational point of view, in order to go back through the water to the point where Miller would have been in the water, could the captain have done anything other than to have returned in his wake and taken a reverse course? A. Nothing whatsoever he could have done.

Q. Assuming further, Captain, that the ship proceeded on a reverse course of 298 until darkness set in, at which time he resumed his original course, in your opinion—at darkness—in your opinion, was he correct in so doing? Should he, in other words, at 5:16, when darkness set in, in your opinion, should he have continued the search during darkness? A. No.

Q. What would you say as to your opinion as to whether he should have heaved to and lay in the water and waited until the next morning, daylight, at, say, (755) 6:31 or whatever it was? A. The element of time would be too great to

find the man the following morning. Daylight would occur somewheres along about 6:30, and that would put the man in the water, assuming—I am assuming now—that he went in the water at midnight of the 24th, 24 hours—midnight of the 14th until midnight of the 15th, plus an additional six hours.

Q. Well, assuming that he hadn't gone in at 11:30, assuming he had gone in the water at 2:30 or he had been in the water two hours less than that. A. I don't think I would continue the search after darkness.

Mr. Flynn: You may cross-examine.

Cross-examination by Mr. Kaplow:

Q. Captain Umstead, were you ever master of a C-2? A. No, sir.

Q. Did you ever sail on a C-2? A. No, sir.

Q. Will you tell us what vessels, if any, you were master of, merchant vessels that were seagoing? A. Master of seagoing, none.

Q. So that you have never sailed as a master on any ocean, is that correct? (756) A. On the ocean, no.

Q. What made you assume, Captain, that Captain Wilder, the master of this vessel, went to the right or starboard when he made this turn or to the left or port when he made his turn? I believe in the answer to Mr. Flynn's question you assumed he went to the right and you said that you thought that is what he did. What made you assume that? A. I believe I heard testimony here to the effect that he had made a turn to the right. I can be corrected on that, though.

Q. Let me read to you a question from Captain Wilder's testimony, and ask you whether it would make a difference in your opinion:

"Q. In making a 180-degree turn am I correct that you can turn either to the starboard or to the port to make the turn? A. Yes, sir.

"Q. Do you recall whether you turned to the starboard or to the port to make the 180-degree turn? A. No, sir."

Would that answer of Captain Wilder's with respect to the fact that he did not know or did not recall whether he had turned to the right or turned to the left make (757) any difference in your answer to Mr. Flynn concerning how the master turned the vessel and whether he got back into his wake? A. No. If the turn had been to the left he would alter course 270 degrees, complete three-quarters of a circle, continue in a straightaway course until such time as he was close enough to the wake to come around to the right, in this case, go back into the wake.

Q. How many degrees of rudder would you have used in making this turn from the 118 degrees true if you wanted to get back on a reciprocal course? A. Could I have that question again?

(Question read.)

A. The maximum rudder, which is probably about 35 degrees.

Q. Immediately? A. Pardon—immediately, yes, surely.

Q. And how long do you think that maneuver would take you? A. You mean to return to the wake?

Q. To return 270 degrees to get on a course of 298 degrees true. A. The turning circle of the vessel is roughly figured at four to five times the length. Assuming that (758) figure would result in about 2,000 feet, that is the diameter of the circle; multiply that by three, as a rough figure, it would make 6,000 feet, which would be close to a nautical mile, 6,080 feet. She would have to turn three-quarters of that which, let us say, for the sake of figures, is seven-tenths of a mile, at the speed of 14.6 knots, we would be steaming one knot every four minutes. So I think as a rough estimate at the time he was three-quarters the way round in his turn he had used up, oh, let's say three minutes.

Charles E. Umstead, for Defendant—Cross.

Q. Now, is that taking into account the turn to 270 degrees and then back to the 298 degrees true? A. To complete the entire circle and come back into the wake would have taken him probably another minute or so. I only figured three-quarters of the turn.

Q. That would be how many minutes, all told? A. I'd estimate it at three minutes.

Q. How much would the total maneuver time take? A. Oh, four to five minutes at the most, I would say, offhand.

Q. In your opinion, if you have a slight sea how long would a wake be visible? A. I'd estimate the wake in a slight sea would remain visible for about two miles, in which time you would (759) have about eight minutes before it would be gone at 15 knots.

Q. Well, does the wake travel as fast as the speed of the vessel? A. No, obviously. The wake is a turbulence from the propeller which is always being pushed backwards, so it never moves at the same rate as the ship.

Q. Then how did you calculate that it would be in existence for three or four minutes? A. Personal experience.

Q. And in your opinion was it possible for Captain Wilder to have seen his wake after making this turn based upon your testimony just now? A. Yes, definitely so.

Q. On a partly cloudy day is it possible to take a fix? A. It is possible if the clouds are not obscuring the celestial objects you want to use, yes.

Q. What is your definition of a partly cloudy day? A. Oh, approximately a half or slightly more of the sky is covered with clouds.

Q. Isn't it a fact that when that condition exists you can take a fix at some time during the day? A. Oh, yes, surely, yes.

(760) Q. Would you consider a man being reported overboard or missing or disappearing from the vessel at sea some four days out of New York as an emergency? A. A man overboard? A man overboard is always an emergency.

Charles E. Umstead, for Defendant—Re-direct.

Q. And as a navigating officer would you want to know where your vessel was during that emergency? A. Not right immediately. Some time after possibly. But the main thing here is to get back to where the man is.

Q. And you would try to find where you were, wouldn't you? A. Yes, but as far as this search deal is concerned it is immaterial.

Q. It doesn't make any difference where you are on the ocean when you are looking for a man? A. No, not in this case, no.

Q. Would you think it important to attempt to take bearings or fixes when you had a partly cloudy sky, to find out where your position of your vessel was in an emergency? A. In an emergency or at any other time you always want to know where you are.

Mr. Kaplow: Thank you, Captain. That is all.

(761) *Re-direct examination by Mr. Flynn:*

Q. Captain, isn't it your recollection that Mr. Ware testified that when the ship took a 270-degree turn it took a turn to the right? A. I recall—I believe I am certain in saying that I recall Mr. Ware having said the turn was to the right.

Mr. Flynn: That is all. I have no further questions.

The Court: All right, thank you, Captain.

(Witness excused.)

The Court: Gentlemen, have you any further witnesses?

Mr. Kaplow: Does the defense rest?

The Court: Does the defense rest?

Mr. Flynn: Defendant rests.

The Court: Do you wish to call witnesses in rebuttal, Mr. Kaplow?

Colloquy.

Mr. Kaplow: Yes. I call Captain Feinne on the stand in rebuttal.

* * * * * *

(812) The Court: Well, Mr. Flynn, I admit the validity of all of your legal arguments, and as I said before I am suffering more than the passing torment that you go through in a matter of this kind, but we have been on trial now for a full week.

Mr. Flynn: Yes, sir.

The Court: And it has been a long and arduous trial in which both sides as well as the government have invested much time and much money. (813) Would it not be the better part of wisdom to permit the jury to make such findings as they wish to make under a proper charge and perhaps in answer to specific questions and then reserve for the Court whatever functions the Court must perform after the jury verdict, so that in the event of an appeal, if the Court is in error, at a preliminary stage of the case matters can be set right. If the Court is in error at another part of the case, matters can be set right.

In other words, if you have a jury finding, and if you have a legal ruling, the appellate court can either take the jury finding or take the legal ruling or make its own ruling based upon whatever we have done here, but if the task is incomplete and at the end of this long and arduous trial the jury is permitted to leave the courthouse, and in the event you are wrong, supposing I sustained your arguments, but supposing the appellate court found that you were wrong, there would be the necessity for a second trial at great expense to the plaintiff and at great expense to the public and at great expense to you.

I am merely putting it to you and I want to use an expression which I understand Judge Woolsey (814) use to use about judicial husbandry. There have been many cases where the trial judge has been convinced that a course of conduct was proper and he has been rudely awakened to

the fact that it was not proper by an opinion of the circuit court which was binding upon him.

Mr. Flynn: Yes, but your Honor——

The Court: Then there not being a jury verdict they had to go to trial all over again.

You have made very logical and compelling arguments, I must admit, but I am just wondering whether it isn't to your interest as well as the interest of the plaintiff in this case, the interest of the public, to dispose of this whole matter, have a complete record, then after the conclusion of the jury's deliberations decide what the proper legal ruling should be.

In that way there won't be a second trial. At worse there will be an appeal.

Do I make myself clear?

Mr. Flynn: Yes, sir, you make yourself clear. In other words, in effect what you would be doing would be deferring your rulings until after a jury verdict, with the procedure under the rules of this court of moving within ten days to set aside the jury's verdict.

(815) The Court: That's right.

Mr. Kaplow: May I interject at this point?

The Court: Wait a minute. Have you finished your argument, Mr. Flynn?

Mr. Flynn: Yes, sir. I just want to say one thing. Like the other day, I was going to ask your Honor, where in this testimony is there any—I am not asking; it is a rhetorical question, please—where in this testimony is there any probative evidentiary evidence of causation? In other words, that the failure to properly rescue cause the decedent's death?

In other words, there has been nothing offered on it. There is no testimony. In other words, Judge, we haven't gone around here to try to claim it. There has been no testimony offered in the case on the point.

It isn't a question of your Honor telling a jury to decide whether the testimony is true. I cannot find any testimony.

Colloquy.

That is all, your Honor. Thank you for your courtesy.

The Court: I can assure you that these considerations have been very much in my mind. In that connection there was that case of a man who fell off the barge, where the court went to a great deal of (816) trouble in analyzing the evidence. It was the Kirincich *vs.* Standard Dredging case.

As I recall the facts, the court on appeal went to a great deal of trouble to prove, which was done fairly convincingly, that if other means had been used which were available to the crew at that point this man, who was a good swimmer and whose life shouldn't have been lost, should have been saved.

Mr. Flynn: That's right, yes, sir.

The Court: So that inferentially it sustains your argument.

All right, thank you very much.

Mr. Kaplow, you have a very hard case legally, and I don't know how you are going to get by it, but you have got the Ferro case staring you in the face, you have got these other cases, the Johnson and Kirincich cases. I am deeply disturbed about the legal basis for your case.

I wish you could tell me first: Am I properly stating the rule when I say that the plaintiff has the burden of proving by a preponderance of evidence that the captain or the associate officers of this ship must have been aware of some objective signs of the mental instability of James W. Miller which (817) should have led them to take proper measures so that Miller would do no danger to himself, or to put it a little bit more boldly, what have you to indicate that the captain or the officers or the crew could reasonably have foreseen that James W. Miller on the night of November 14th to November 15, 1950, was probably going to jump into the ocean?

Mr. Kaplow: Your Honor, we have the testimony of Mr. Levy. While your Honor would not consider him a hostile witness, I think your Honor would certainly agree with me that he was an interested witness.

Colloquy.

The Court: Because of his employment, his prior employment?

Mr. Kaplow: Not only because of his prior employment; because of the fact that while he refused to attend at my office, he was at all times conferring with the defendant at their office, and if he was strictly a neutral witness it wouldn't have made any difference to which attorneys he spoke. Secondly, the defense counsel were able to assure the Court that they would produce him at any particular time that the Court wanted, and not knowing whether or not the man was under their control, I used the subpoena power of this court in (818) order to be sure that he was within the court. If I had not used it and then the witness was not produced, certainly then I would have been critized for not having produced a neutral witness.

The Court: I think as a matter of law that you are on very, very unsound ground in claiming that this man should have been ruled by me to be hostile. I don't think so.

Mr. Kaplow: Certainly he is an interested witness, your Honor.

The Court: And I don't think that his performance on the stand would justify it. But assuming I am wrong about that; let us assume you are right and I am wrong; the important thing about Levy is this statement that he swore to before the consul at Dakar. He wasn't a witness for any lawyer at that time.

Mr. Kaplow: He was a witness for himself, your Honor.

The Court: He was not in the middle of a lawsuit and he said everything that he had to say at that time and nothing that he said on the stand, in my opinion, contradicts or derogates from this sworn statement before the consul at Dakar. So hasn't substantial justice been done? Hasn't this man been (819) made to repeat substantially what he said then when there was no lawsuit and when he had no reason one way or the other to lie?

Colloquy.

Mr. Kaplow: Well, your Honor, in answer to that I can only say that what is there in this testimony that he left out? He was so consistent with his other testimony, but we know in addition——

The Court: You tell me. What is the fabrication? What is the threat of perjury in this statement before the consul?

Mr. Kaplow: He never told the consul about the rum incident, which is a very important factor here.

The Court: How is it important?

Mr. Kaplow: It certainly shows that he either was doing one of two things; he either was being sociable, which is the best point of view that can be seen from the defense point, or he was acting as a doctor, in giving what he thought was therapy by the use of alcoholic beverages.

The Court: Well, you certainly have not been able to sustain any such proposition. I am sure that you are a man of mature years and you have probably seen service during the last war.

Mr. Kaplow: That's right, sir.

(820) The Court: And I am sure that there is nothing unusual about men who live in close confinement passing on their beer or their whiskey as a matter of hospitality.

Mr. Kaplow: Of course, when they are not supposed to have it aboard ship——

The Court: This happened two days before the night of the 13th to the 14th.

Mr. Kaplow: That's right, and that was the night he did not sleep in his bed, the first night he did not sleep in his bed.

The Court: You say that Levy acted as a kind of psychiatrist?

Mr. Kaplow: I say it is an issue of fact, your Honor, whether Levy has told the whole truth or has left out such things that would be damaging to him personally. It is an issue of fact for the jury to determine.

The Court: Well, you can't make them up. You can't supply the missing links. What he says is——

Colloquy.

Mr. Kaplow: I don't intend to make them up, but they can disbelieve his testimony.

The Court: When they have disbelieved it, what have they got, a vacuum.

(821) Mr. Kaplow: No, no, I am sorry to disagree, your Honor. They don't have a vacuum. They have facts.

The Court: What facts?

Mr. Kaplow: They have the fact that he did not sleep in his bed, the fact that Levy made his own search and did not look for this man until coffee time, although he was very, very quick to tell us, and repeatedly, that the only reason he wanted to look for him at nine o'clock was to find him for coffee time and alert him for coffee time, when Levy knows well, as Captain Feinne testified and as any other master would have testified, that coffee time is something that is so traditional you don't have to notify your assistant to go to coffee time.

The Court: I don't recall that. I recall that he said that he looked for him at nine o'clock because he had a job to do and he wanted the assistance of Miller in connection with that task.

Mr. Kaplow: When he didn't find him he did the job himself, but he was looking for him also to alert him for coffee time.

Now, you see there is a man who has disappeared, who lived in the same room with another man for four days. (822) Certainly this man who is alive has a deep interest in what the world is going to think about how his actions were and what he says and what he does, and certainly he does not want to come out in court and we wouldn't expect him to come out in open court and say, "I was careless. I knew very well he was moody. I knew very well he was depressed. He told me about one thing and we went into it much more deeply, but I can't confess to this because if I did I would be committing a civil act of negligence."

Colloquy.

And more important—and I don't think it should be part of the record, and I would like to have the stenographer stop at this point.

The Court: Yes.

(Discussion off the record.)

Mr. Kaplow: It is based upon human conduct. Now, if Mr. Levy at any time had come in and been a self-confessed negligent actor, we couldn't be trying a jury lawsuit. We wouldn't be in court. I think that is one of the factors that is very important here.

With respect to the probative evidence as to whether a reasonable and proper search would have found Miller, and also whether or not that relation to causation exists in this case, certainly in a death (823) case the burden on the plaintiff is less than in a live injury case. I mean I think that that is the law and I will be able to supply your Honor with——

The Court: How much less? You still have to prove it to the jury's satisfaction by a fair preponderance of the evidence, and you have to prove that the alleged fault or negligence on the part of the defendant caused——

Mr. Kaplow: Was the proximate cause in whole or in part of the final decease of this man.

The Court: Well, you can't say "final decease." That is like that phrase "conscious suffering." You are either deceased or you are not deceased, and you either suffer or you don't suffer. You can't have unconscious suffering and you can't have temporary demises.

You have to prove that it was the proximate cause in whole or in part of the decease of James W. Miller. How do you do that?

Mr. Kaplow: By proving that if there had been a proper search then there was a reasonable expectation that they would have found him, because Captain Fienne has testified that he would have been alive had they started and done a proper search.

Colloquy.

The Court: But Captain Fienne couldn't (824) possibly testify to any such thing because there is no basis in the evidence. On the contrary, it seems to me that Captain Fienne opened up very largely the possibility that if this man hit the water near No. 4 hatch, where he was last seen, the probabilities are that he did not stay in the water alive very long, because he fell from a height of 20 to 25 feet, and he fell at a point——

Mr. Kaplow: Not No. 4.

The Court: Well, as I recall it, he said if you got off the ship near the midship section where No. 4 hatch happens to be, as I recall it——

Mr. Kaplow: No. 4 is after the midship house, and it goes lower as you go to the stern end of the vessel. It was 10 to 15 feet lower at that point.

The Court: Well, I have the definite impression that the questions I put to Captain Fienne justified or would justify the conclusion that it was very unlikely that Miller would have survived the fall from that section of the ship.

Mr. Kaplow: I think that is a question of fact, your Honor.

The Court: Let us assume I am wrong as to that.

(825) Mr. Kaplow: That is a question of fact.

The Court: Let us assume I am wrong. All you have proven is that Miller was last seen alive at 11:30 P. M.

Mr. Kaplow: That's right.

The Court: You don't know when he died.

Mr. Kaplow: No.

The Court: You don't know how he died.

Mr. Kaplow: That's right.

The Court: You don't know how he left the ship.

Mr. Kaplow: That's right. He could have left it by going, falling from the poopdeck; he could have fallen—he could have jumped from the bulwark at No. 4 or he could have fallen from the midship house if he had gone back in the passageway.

Colloquy.

The whole situation here is what they didn't do. That is where the inefficiency of this search comes in, and they certainly didn't make a proper search and didn't conduct the entire surrounding circumstances around the search in a proper manner.

The Court: But there were no overt indications of an accident.

Mr. Kaplow: Not that we know, no.

(826) The Court: No overt indications, nothing.

Mr. Kaplow: They didn't even inquire of the crew members, just the four men.

The Court: I don't know who else they could have inquired of, but they did speak to the men who were most apt to know, and we have the statements made by them, within a reasonably short time, sworn by them before the consul a reasonably short time after the incident. There is no proof in the case as to when he left the ship, how he left the ship, how long he stayed alive. There is a complete void as to that.

Mr. Kaplow. That's right.

The Court: Now you say I am entitled to go to this jury and have the jury decide (a) that the search which was begun on or about 10:20 A. M., November 15, 1950, was incompetent and insufficient, not properly conducted, and that the failure to conduct a proper search was the proximate cause of the death of James W. Miller.

Mr. Kaplow: I think that is an issue of fact, your Honor.

The Court: You say that the jury, in order to reach that conclusion, would have to decide that a (827) proper search conducted in the way you claim it should have been conducted could reasonably have led to the saving of Miller's life.

Mr. Kaplow: Yes, sir, and a timely search, too.

The Court: Don't you see that you are caught in a snare of very, very difficult propositions there, because if Miller was dead at 10:20 A. M.—and there are many indications that he probably was at that point—but if he were

dead at that point, any search conducted by the ship would have been fruitless. It is like the man in the epileptic fit case, who slipped over the side and disappeared and never came up. The jury would have to be satisfied that he was still alive. Isn't that right?

Mr. Kaplow: Yes, sir.

The Court: They would have to be satisfied that he was still alive, and they would have to be satisfied that he remained alive throughout that whole day if you are going to make a point of the fact that the search didn't go far enough and didn't last long enough.

Mr. Kaplow: And wasn't started on time.

The Court: They would have to be satisfied (828) that at all of those points Miller was still alive.

Mr. Kaplow: Yes, sir, because the only way we would ever know whether they actually reached him and conducted a prudent search is if they found the body. It is a disappearance here. We certainly are not being called upon—I don't think the plaintiff can be called upon to produce a body and say, "Here is the corpus delicti; therefore you were negligent." We don't have to go that far.

The Court: No, but I call your attention to the facts in the Kirincich case, 112 Fed. 2nd 163, where the whole question of proximate cause was very fully discussed by the court, and certainly the court wouldn't have gone to that trouble unless they were greatly concerned about the relationship between proximate cause and liability.

Mr. Kaplow: That's right.

The Court: In fact, this man was an employee for four or five days on this ship. Wouldn't it be imposing a very harsh burden on a defendant, who is being asked to respond in the sum of $200,000, merely because a man disappears?

Mr. Kaplow: No, sir.

The Court: Merely because a man perhaps (829) committed suicide on their premises?

Mr. Kaplow: If he had been employed an hour, the length of employment has no bearing or no effect whatsoever on the legal liability of the vessel owner.

Colloquy.

The Court: Do you think it was the purpose of the Jones Act to permit people to commit suicide on the premises of defendant ship lines and collect fabulous verdicts as a result of such an act? It would make suicide pretty profitable, wouldn't it?

Mr. Kaplow: No, sir, I don't think it would make suicide profitable. I think the import of the Jones Act is that the vessel owner shall be responsible for negligence, which includes the failure to treat and the failure to make the proper rescue.

The Court: I intend to charge the jury that if they find that Miller was dead at 7:30 A. M. on November the 15th then they can reasonably come to the conclusion that any search of any kind would have been fruitless and the company should not be held liable for any conduct subsequent to that time, whether they consider it to be a proper search or an improper search.

Mr. Kaplow: Well, is your Honor going to set any standard for how they shall reach the conclusion that he was alive or dead by 7:30 A. M. on November 15th?

(830) The Court: It is one of the propositions that has baffled me terribly in this whole case. I don't know. I am going to reflect upon it some more tonight, but it seems to me that they can, that they must be told that there was no basis upon which they can determine with accuracy when he died. Nobody knows how he died—nobody knows—or when he left the ship. They can find that he jumped overboard or they can find that his disappearance from the ship occurred shortly after 11:30, just as they can find that it occurred at or about 7:30 in the morning. We don't know. In other words, they must do the best they can on the basis of the evidence before them, and I can assure you that it is a very difficult job.

I call your attention to the Johnson case. Mr. Flynn has briefed this Johnson case very carefully. Have you read the Johnson case?

Mr. Kaplow: I probably did but I don't recall it by name at the moment.

Colloquy.

The Court: Well, this is a man who is afloat. The barge was approaching a pier in the East River and he drowned while the tug was removing the two car floats, and there was no eye witness to the accident, and it was not known that he had drowned until after the tug (831) had completed the maneuver. So in a restricted sense it was not quite as dramatic as this case, because it happened within sight of shore and there were small boats involved during the maneuver, but in a restricted sense it was much like this case because it was a disappearance, an unexplained disappearance. Nobody knew how the man got into the water and what led him to drown. The fact is he was on the boat and then shortly after the man wasn't there any more, and shortly after they found out that he was drowned.

You know what happened to that case on appeal? Now, if people on small boats, within sight of each other and within sight of land, can get into a situation like that, you can see how much more compelling the facts of this case are against your contentions.

Mr. Kaplow: Except for one thing, your Honor. I would like to point out that the so-called volunteer theory —that is in McDonough *vs.* Buckeye Steamship—in that case a seaman conducted a fellow seaman, who was intoxicated, from the gates of the pier to the side of the vessel, and in the interval of walking the intoxicated seaman fell down a couple of times, and the volunteer picked him up and carried him a little further. Then he fell down for a third time, and by this time the (832) volunteer could not pick him up any more, and decided he had better go on board for help, and when he went on board for help, in that interval, the man fell into the side, into the water adjacent to the stringpieces of the dock, and the next morning they found his hat floating and they never found the body, and the court found that the vessel was liable They said the volunteer did not have to undertake to assist this fellow seaman all the way back to the vessel, but once having done it he was required by law to do a reasonable prudent job

of bringing him back and bringing him aboard, and he was reasonably responsible for reasonable care of his safety.

The Court: How does that apply here?

Mr. Kaplow: I would like to distinguish it, if your Honor please

The Court: I think I can distinguish it, too.

Mr. Flynn: I am very familiar with the case. In other words, if in the case at bar there were definite signs of mental instability and he should have been protected and he went over the side and we didn't know how, we would still be liable, and that is the *McDonough* case.

The Court: But you don't reach the *McDonough* (833) case here, Mr. Kaplow You say that Levy was trying to treat him with a half bottle of rum. I don't think so. I think all he did was put two Scotchmen together and tell them to be sociable, but where in this case do you have any intervention, any attempt by anybody to treat Miller?

Mr. Kaplow: I didn't introduce the volunteer theory with respect to the neglect to treat, but with respect to the failure to rescue, and following along your Honor's line that your Honor was going to charge the jury that if they found that he was dead by 7:30 A. M. they could not find liability, take the alternate of that proposition: If they found that he was alive and believed that he was alive and believed that there was a hope of rescue, then I say that the ship, whether she had to undertake a search or didn't have to undertake a search, once having undertaken a search, she was obligated to do it in a reasonably prudent manner and having failed to do that, the imprudent or inefficient manner of the rescue was a proximate cause in whole or in part of the final death of this man .It all depends on a finding of fact of the jury in accordance with your Honor's reasoning that the man must have been alive after (834) 7:30 A. M.

The Court: But did you hear what Captain Sheridan said, that in his experience there were very few men who fell overboard who were ever saved after the first hour;

that most of them who were saved have been saved in the first half hour or first hour.

Mr. Kaplow: But you heard Captain Feinne testify that the man would be alive.

Mr. Sullivan: He said he didn't know. Here is the page right here.

Mr. Flynn: Here is the testimony of Captain Feinne on that score.

Mr. Kaplow: I think somewhere in this testimony he stated that the man definitely could survive in the water.

The Court: "There is no possibility whatsoever"—this is on page 102—"no possibility whatsoever that Miller could have been afloat from 11:30 the night before until that time, is there?

"A. I don't know. I don't know. You don't know either. Nobody knows."

Mr. Kaplow: Until what time? It is out of context.

The Court: 11:30 the night before, until that (835) time.

Mr. Kaplow: It is out of context, unless we knew what time he was talking about.

The Court: 20 hours, 20 hours later. This is when the search was discontinued. "I don't know, I don't know. You don't know," and so forth.

"A man didn't have any lifebelt, did he?"

"I don't know. Log book doesn't say anything about it."

"Assuming that he had no lifebelt, is it your opinion he would have been afloat for 20 hours?

"I don't know, sir. I can't answer that. I don't think anybody in the world can answer that."

Mr. Kaplow: I contend that if there was a search and if the jury finds in accordance with your Honor's contemplated charge that the man was alive at 7:30 A. M. and could have survived during the day, that then they must have made and were legally obligated to make a reasonably

prudent search, and having failed to do that liability attaches.

The Court: Don't you see, all you would have to do, then, would be to get in some expert testimony disagreeing with the other side on what a competent search is without showing causation, and you (836) have got your element for liability already established.

I don't think that the law entitles you to do any such thing.

Mr. Kaplow: I think so, your Honor.

The Court: I think you have got an affirmative duty to offer probative evidence of the causal link between the alleged negligence and the loss of life. You are suing for loss of life here.

Mr. Kaplow: How can you do it in any disappearance case?

The Court: It may be that there are disappearance cases where people cannot collect money and maybe this is one of them. Certainly the *Johnson* case was apparently one, where even the most astute lawyers couldn't find a basis upon which they could establish causal relationship, and maybe you have run up against the same obstacle, I don't know.

Mr. Flynn: If your Honor please, there is a distinction between the *Johnson* case and this case. In the *Johnson* case, on both trials, there was testimony that tended to cause a relation. I say in this case the plaintiff—I am not criticizing any testimony—I say that no testimony has been introduced. There (837) was none by Mrs. Miller. There was none by Mr. Levy, and I have combed through the transcript of the testimony of Captain Feinne, and the only reference to whether the man was alive was what I asked your Honor to read a few minutes ago.

In other words, this case is entirely barren. They have not only not met the burden, they have no testimony probative or otherwise that has been introduced.

The Court: What was there in the *Johnson* case that does not exist here?

Mr. Flynn: Pardon?

The Court: You said there was something in the *Johnson* case.

Mr. Flynn: They attempted to prove causal relation. There has been no attempt here.

The Court: Oh.

Mr. Flynn: There is no testimony that can be alluded to that has bearing on the causal relation.

The Court: I will tell you, gentlemen, I have tried to be worthy of your own very competent efforts in this case, and to not only read your briefs but reflect upon all the authorities. I did some work over the weekend as well on it. I think that the better part of wisdom is for me to reserve decision and (838) defer any action until after the jury comes in.

I know that charging a jury is going to be extremely difficult, but I think I should do it and I think I should do it in the interests of avoiding the expense and the inconvenience both to the court and to the parties of any further trial proceedings.

After the jury's verdict I think it would be timely for me to decide what if any action I should take, and I will invite Mr. Flynn to renew his motions at that time.

Mr. Flynn: Of course, if your Honor please, in a case like this, naturally there is a great deal of sympathy, for a jury, I mean. Your Honor is well aware of that. It is a death case, a wife and a child, question of the child.

The Court: I know.

Mr. Flynn: I mean, putting it to a jury with no evidence.

The Court: Well, I can only say what I said before. I won't shirk from my responsibility, and a very heavy one rests on me in this case, but I think that after a case is long and as complicated and as difficult as this it would better serve the ends of justice to have a complete record and to obviate further (839) trial proceedings than to take it

out of the jury's hands now, and I think, too, depending on what the jury finds it may perhaps resolve itself in a jury verdict, I don't know. Maybe you won't have any legal questions to raise after the jury verdict. We don't know how the jury is going to find. I think we should go to the jury, gentlemen, although I am making no decision on the motions. I am reserving decision and I invite Mr. Flynn to renew his motions after.

Mr. Flynn: I want to say, your Honor, you have been very courteous to counsel throughout the trial, to Mr. Kaplow and myself.

The Court: I will pay you the compliments you deserve when I charge the jury.

(Adjourned to October 25, 1955, at 10 A. M.)

* * * * * *

Plaintiff's Exhibit 28.

Excerpts From Chief Officer's Log Book of SS. *African Glade*, November 9 through November 15.

(*Opposite* ☞)

Plaintiff's Exhibit 28.

Log of the S. S. Chicago Glade **enroute from** Baltimore **to** New York

Port **DATE** Thursday, Nov. 9/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ GYRO	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M. 12 Mid	Voy. #14 Ends,			Voy #15	Begins						
2	Proceeding to	Pilot	station	on	our	courses	as	per	Pilot		
3 31	Pilot aboard	342	Kept	346	Overcast	4/c	@	Passed	Close	Sight	Ely sea
4		095°	106	SE	3	30.02	62				Nice, good (BWB)
5 14	Sandy Hook	4/c	@	Close	By	Bar		C/C	033	GYRO	
6 57	Buoy #2	PB	@	4	miles						Sight & Ely sea and
7											ovd. Ely swell Hzy.
8		033	040	SSE	3	30.01	65				cloudy. (F.J.W)
9 32	Buoy	4/c	@	2.5	miles	C/C	033	99	E0		1142 General Quarters 4/c
10											
11 55	Pilot	South	aboard								Sight sea and swell
12		Various	SE	2	29.96	68					Hzy cloudy (W.E.B)

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	Dist. to Go

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		Stand	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M. 1	Various	spuds	&	courses	as	per	bell	book	&	dock	1 22 Tug G.J. Barrett
2	alongside	aft	spud	1 24	Mooring	Pilot	Jorgenson	aboard	2 01	Tug	Louis Moran
3	alongside	boat	#3	2 18	Tugs	Sankaty	&	Nobska	2 42	GWE	2 42 Tugs away. Pilot
4	away	2 45	8	gangs	of	4/s	aboard,	docked	at	pier	#2, 3, & 4 NYS. Bayside, New York
5	Board	of	Underwriters	aboard	3 15	NYS.	Bayside	C/C	3 03	Comm.	loading #4
6 3 25	Comm.	loading	#5	- 3 15	Comm.	loading	rubber	cargo	in	steel	bot. 3 53 Fine
7	rubber	cargo	Tugs	along	side	#2	PD.	4 10	Tugs	along	side #3 & #1 5 00 B.O.
8	Brennan,	Mate	Mate	on	duty.	6 00	4/s	&	0/s	for	supper. 7 00 Seven gangs
9	aboard	to	resume	loading	8 00	Comm.	loading	cub	cargo.	11 00	All 4/s stop
10	work	for	day	4/c	Captains	instructions	-	all	secure.	B.O.	Brennan
11	N/M	released	by	S.	Shores	N/M					(BWB)
12				C	1	2988	64				

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS				DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		FOR'D	AFT.	MEAN
			No. 1	8	10			A. M.			
			2	0	0			11 00 P. M.	11'-01"	13'-09"	13'-05"
			3	0	15			Leaving			
			4	12	12			Arriving	9'-02"	14'-06"	11'-10"
			5								
			~~Fore~~ D/T Peak	#1	0 - 0			Fuel	3,710 Bbls.		
			After Peak	#2	0 - 0			Water	416 Tons		

Plaintiff's Exhibit 28.

Log of the S. S. African Glade **enroute from** ~~to~~ Pier #33 Brooklyn, N. Y.

Port New York **DATE** Sunday, Nov. 10/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		Stand	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M. 1				W	2	29.90	58		00	01	Note. Mate A. Shows on duty.
2											Questions inspectors. Finds &
3											gang way etc. All secure
4	Fires & Aloft			W	3	29.92	62				
#8[00]	8 gangs of	½ wkd.,		slow		Ltd.	~~#~~		2.3	4	8[00] Start loading sub, 2nd Mate
6	Stocking.	8[00]		Esso		Lantern	#307				along side. 8[00] to 10[45] Loading sub. Supt.
#9[45]	Comm. taking on	fuel oil		10[00]		Finish					ship, gang resumes loading #2 5/D
8	3 Carpenters aloft,			Storing		cargo					Hatches.
9											
#1130	½ 12 Noon										
#12[00]	All gangs	stop		work		for					lunch - Sub on 2 to work through lunch hour
#1[00]	7 gangs	loading		aft		hatches	2 gangs				on #2. 2[30] Load Klp Mariner

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	~~Dist. to Go~~
8[00] AM	Capt. A. T. Wilder relieves Capt. L. Page as Master								

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		Stand	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M. 1	Baggage room. Checked up					2nd Mate		4[30]			Mason's Electrical Co. Service men complete
2	w/Bales & dispatch.	5[00]		Comm.		loading					mail on #2 5/D. 5[25] to 6[15] Touching
3	Baggage on #4.	7[00]		Cover #4		5[-20]					Finish taking on fuel - used 6383 Bbls.
#5[45]	Finish & close up #1.	7[00]		Finish		loading					mail #2, comm. loading
5	Hatch tarps secured.	Finish.	7[30]			Remove					Passengers baggage from back aft.,
6	Passengers	bars	ship	clear	&	depart		8[10]			Finish & Close up #2. 8[20] Finish
7	and close up #3,			Stevedores		leaving					ship. 8[50] All Stevedores off vessel.
8	& George Barrett	along	side.				7[00]				Sandy Hook Pilot aboard. 8[45] Tugs Susan & Moran
#9[15]	Tested Bell Mar. gear -			all	o.k.	8[47]		Docking			Pilot E. Anderson aboard. 9[00] S.B.E. Tugs
10	made fast fore &	aft.		9-2		Last	line.	9[45]			Docking Pilot & tugs away. 1059 Sandy
11	Hook Pilot away.	11[00]		Dept.		Ambrose	L/V	0	098°		11[10] Set Co 106° 11[16] Amb. L/V @ close fog
12											Horn & fore. Mod. ME by sea. BMD

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS				DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		FOR'D	AFT.	MEAN
			No. 1	4"	4"			0700 A. M.	11-00	15'-10"	13'-05"
			2	0	0			P. M.			
			3	2"	8"			Leaving	12'-08"	21'-04"	14'-00"
			4	9"	14"			Arriving			
			5		0			Dept. Fuel	10,055 Bbls		
			D/T Fore Peak	1 -	0 -	0		" Water	530 Tons		
			After Peak	2 -	2" -	0					

Plaintiff's Exhibit 28.

Log of the S. S. Chicago Glade **enroute from** New York **to** Dakar

Port **DATE** Saturday Nov. 11/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ G.Y.R.O	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M.											
1											
2											Ocast. Mod. to rough
3											N.E. by sea. Vessel pitching
4	82.2	106°	117°	NE	5	30.15	48	59			easily. G.M.T.
5											
6											Ocast. Mod. to rough N.N.E. by
7											sea & E. by swell. Vessel pitch-
8	82.7	106°	120°	NNE	5	30.15	50	64			ing and rolling easily. G.M.T.
9											Ocast. Rough N.E. by
10											sea and swell. Vessel
11											pitching & rolling, modly.
12	80.5	106°	120°	NNE	5	30.15	52	64			Vis. good — G.M.T.

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	Dist. to Go	12 00 Noon Tested
39-3 N	70-01 W	106°	184'	13h	14.16	184	13h	14.16	3136	Auto Alarm

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ G.Y.R.O	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M.											
1											
2											Ocast. Rough N.E. by sea
3											Vessel pitching easily.
4	81.1	106°	121°	NE	4-5	30.11	56	64			G.M.T.
5											
6											
7											Ocast Mod N.E. by sea
8	81.0	106°	121°	NE	4	30.12	54	64			and E. by swell G.M.T.
9											
10											N. Westerly, cloudy. Mod
11											N.E. by sea and swell.
12	79.8	106°	123°	NE	4	30.09	65	70			Vis. good. G.M.T.

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS				DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		FOR'D	AFT.	MEAN
12 - 4	Lor. Smith		No. 1	4"	4"			A. M.			
		Kelleher	2	0	0			P. M.			
4 - 8	T. Alexander		3	2'	8"			Leaving			
			4	9"	14"			Arriving			
			5	0							
8 - 12	Rivera	Rising	DT Fore Peak	1	0	0					
		Ramos	After Peak	2	2"	0					

Plaintiff's Exhibit 28.

Log of the S. S. African Glade **enroute from** New York **to** Baltimore

Port **DATE** Sunday, Nov. 12/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ C/R 6	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M. 1											
2											P. Sky. cloudy Moderating winds & seas. Made
3											
4	80.0	106°	124°	NE	1-2	30.08	67	74			N.E. by sun. 0800
5											
6 00	Advance clocks	1 hour	D gone				+3				D cast. Continued mod.
7											E by sun. Vessel pitching
8		106°	124°	E	3	30.07	70	74			& rolling mod. by. 1200
9											Mostly cloudy. Vessel pitching
10											& straining heavily at times in
11											rough E by sea and
12	78.6	106°	127°	E	4	30.06	72	74			heavy swell. 1600

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	Dist. to Go	12 00 Noon
38-02N	63-08W	106	331	23h	14.39	515	1d-12h	14.30	2805	Tested Auto Alarm

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ C/R 6	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M. 1											
2											P. Sky. cloudy Mod. Strong E NE by
3											sea & confused swell. Vessel
4	79.0	106°	127°	ENE	4	30.02	70	72			pitching mod. & heavily at times 1600
5											
6											P. Sky. cloudy.
7											Mod. E by N. by sea cont.
8	80.0	106°	130°	ENE	4	29.99	72	74			swell. 2000
9											
10											P. Sky. cloudy. Mod. E & S by
11											sea & low E by swell.
12	79.3	106°	130°	ESE	3	29.94	74	75			Vis. good. 2400

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS				DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		FOR'D	AFT.	MEAN
12-4	Lov	Smith	No. 1	5"	4"			A. M.			
		Kelleher	2	0	0			P. M.			
			3	4"	8'			Leaving			
4-8	Alexander	Thomas	4	9"	14"			Arriving			
			5	0							
12-4	R...ig	Revera	~~Fore Peak~~	0/T							
		Ramos	After Peak	1	2	5"	0				

Plaintiff's Exhibit 28.

Log of the S. S. African Glade **enroute from** New York **to** Durban

Port **DATE** Monday, Nov. 13/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ GYRO	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M.											
1											
2											Partly cloudy smooth
3											sea much low & W'ly
4	799	106°	130°	S	1	29.88	46	45			swell PKH
5											
6 30	0/C	to 112°	94	0							
7											Occas. Mod. NW'ly sea
8	80.2	112°	137°	NW	4	29.88	42	43			and con. swell. PKH
9											
10											Partly cloudy. Mod.
11											NW'ly sea and swell.
12	799	112°	137°	NW	3	29.92	42	43			Vis. good. PKH

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	Dist. to Go	
34°-16'N	56°-22'W	108	343	24h	14.29	858	2d-12h-00	14.30	2462	12 Noon Tested Auto Alarm

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		Stand	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M. 00											
1 PM	Call all hands to fire stations - 6 hoses out & good pressure applied. 1st Secure										
2	from drill - Hold boat drill. Crew & passengers mustered at their stations &										
3	instructed in duties. Both boats lowered & the sail. 1 27m Secure from drills.										
4	79.2	112°	136°	NNW	4	29.90	42	43			Cloudy. Mod. NW'ly sea & swell. PKH
5											Vessel Saturday cloudy
6											
7											Partly cloudy Mod NW'ly sea
8	79.4	112°	136°	NNW	4	29.92	42	44			and S.E'ly swell PKH
9											
10											Scattered clouds. Mod NW'ly
11											sea and swell.
12	79	112°	136°	NW	3	29.95	42	44			Vis. good PKH

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS				DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		FOR'D	AFT. MEAN
12-4	Lar	Kelleher	No. 1	9"	9"			A. M.		
		Smith	2	0	0			P. M.		
4-8	Thoms	Alexander	3	12"	14"			Leaving		
			4	12"	12"			Arriving		
8-12	Rivera	Rising	5		0					
		Ramos	~~Fore Peak~~ D/T	1-	0-	0				
			After Peak	2 -	2"	0'				

Master

(5)

Chief Officer

Plaintiff's Exhibit 28.

Log of the S. S. Chiwawa Glade **enroute from** New York **to** Dakar

Port **DATE** Tuesday, Nov. 14/50

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		Stand	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
A. M. 1											
2											
3											Clear and fine. Small
4	80	112°	136	NW	2	2996	73	72			NW'ly swell. G.D.R.
5											
6											
7											Fair, cloudy. Mod. NW'ly
8	80.2	112°	136°	NW	3-4	2998	44	44			sea and swell. G.D.R.
9											
10											Mostly cloudy. Mod. NW'ly
11											sea and swell.
12	79.8	112°	136°	NW	3	30.01	47	44			L.S. good. G.D.R.

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot. Av. Speed	Dist. to Go	
34-02 N	49°-37' W	112°	35.2	24h	14.66	1210	3d-12h-00	14.40	2110	12 00 Noon Tested Auto Alarm

Hour	Log	Course		Wind		Barometer	Temperature			Stand. Comp.	Remarks
		~~Stand~~ GYRO	Steer'g	Direct	Force		Air	Water	Var.	Dev.	
P. M. N/12 Noon	c/c	to 118°	GYRO								
2											
3											Fcast. Passing rain squalls.
4	79.7	118°	143°	2-3	5	30.02	46	44			Small confused swell. G.D.R.
5											
6											Fcast. Intermittent rain
7											squalls. Mod. S'ly swell
8	79.2	118°	143°	4	5	30.04	46	43			G.D.R.
9											Fcast & cloudy. Occas
10											rain squalls. Mod. S'ly
11											sea.
12	78.9	118°	143°	4	5	30.08	44	42			G.D.R.

ON THE LOOK OUT AND AT THE HELM

From m. to m.	LOOK OUT	HELM
12-4	Lor Smith	
		Kelleher
4-8	Thoms	Alexander
8-12	Rising	Reverre
		Ramos

BILGE SOUNDINGS

	A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D
No. 1	9"	8"		
2	0	0		
3	12"	14"		
4	12"	12"		
5				
~~Fore Peak~~ D.T.	1 -	0 - 0		
After Peak	2	2" - 0		

DRAFT

	FOR'D	AFT.	MEAN
A. M.			
P. M.			
Leaving			
Arriving			

Master

Chief Officer

Plaintiff's Exhibit 28.

Log of the S. S. Pecan Gale **enroute from** New York **to** Dakar

Port Dakar **DATE** Wednesday, Nov. 15/50

Hour	Log	Course Stand.	Course Steer'g	Wind Direct	Wind Force	Barometer	Temperature Air	Temperature Water	Var.	Stand. Comp. Dev.	Remarks
A. M.											
1											
2											Clear
3											squalls
4	772	118°	143	S	3	29.99	72	72			Clear squalls. Slight & Sly Swell. G.M.T.
5											
6	6 a.m.	Advance clocks 1 hour to gone							Time +3		Hazy
8:00	78.9	118°	143°	S	3	30.03	74	74			and
10:20	J.W. Miller, Asst. Elect. reported missing since some time										
9	Ch. Elect. K.O. Levy. Vessel now being searched for missing man										
10	man not found, course altered 180° to 298°, now searching for										
11	Lookout on bridge, flying bridge & bow. Weather Ship "E" H Y E contacted by telephone, and						105.7		New York Office		Hazy, clouds. Slight & Sly sea and swell. G.M.T. Lookout on bridges, flying bridge & bow. Vessel Searched, searching for Miller, presumably over board. New York Office notified. 1110 Coast Guard
12	78.9	298°	317°	S	3	30.12	76	74			possibly man reported. G.M.T.

Latitude	Longitude	Course	Distance	Time	Av. Speed	Tot. Dist.	Tot. Time	Tot.	Tot. Time	Tot. Av. Speed	Dist. to Go	
31°-40' N	44°-15' W	YOR	336	23h	14.60	1546	4d-11h-00		4d-11h-00	14.45		12 Noon Sighted Gale Alarm

Hour	Log	Course Stand.	Course Steer'g	Wind Direct	Wind Force	Barometer	Temperature Air	Temperature Water	Var.	Stand. Comp. Dev.	Remarks
P. M.											
1											
2											Hazy. clouds. Lookout on bridges,
3											flying bridge & bow.
4	80.	298°	317°	S	2	30.08	76	74			Swell & Sly swell. G.M.T.
5 16	Ck to 118° gyro			Darkness sets in - search for							search for missing man
6	discontinued. Man not found. G.M.T.										
7											Hazy. clouds. Slight & Sly sea
8	79.9	118°	143°	S	4	30.11	73	72			and swell. G.M.T.
9											
10											Scattered squalls. Slight & Sly
11											sea and swell.
12	78.3.	118°	143	S	3	30.14	72	74			Visibility good. G.M.T.

ON THE LOOK OUT AND AT THE HELM			BILGE SOUNDINGS			DRAFT			
From m. to m.	LOOK OUT	HELM		A. M. PORT	A. M. STARB'D	P. M. PORT	P. M. STARB'D		STARB'D	FOR'D	AFT.	MEAN
12-4	Kelleher, Lav		No. 1	8"	9"			A. M.		A. M.		
	Smith		2	0	0			P. M.		P. M.		
			3	12"	14"			Leaving		Leaving		
4-8	Thoms. Hlexander		4	12"	12"			Arriving		Arriving		
			5	0								
8-12	Revera	Rising	~~D.T.~~ Fore Peak	1	0	0						
		Ramos	After Peak	2	2"	0						

Master (7) Chief Officer

EME COURT, U.S.

No. 607

Office: Supreme Court, U.S.
FILED
NOV 1 3 1957
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

Civil Action No. 72-258

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant.

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT

HERBERT J. KAPLOW,
Attorney for Plaintiff-Appellant.

UNITED STATES COURT OF APPEALS
FILED
MAR 4 1957
SECOND CIRCUIT

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United States Court of Appeals

For the Second Circuit

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of James W. Miller, deceased,

Plaintiff-Appellant,

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

Statement

This is an appeal from a final judgment of the Court below, setting aside a jury verdict in favor of plaintiff-appellant in the sum of $55,000, and directing a verdict in favor of defendant-appellee.

This suit at law was an action to recover pecuniary damages for the wrongful death of plaintiff-appellant's decedent and was predicated upon the provisions of the Jones Act, 46 U. S. C. Section 688.

The complaint alleged two counts of negligence. The first count alleged negligent failure to provide adequate, prompt and proper medical care and attention. The second count alleged negligent failure to take proper and efficient means to effect a rescue of plaintiff-appellant's decedent.

Trial was held before the Honorable Edmund L. Palmieri and a jury in the United States District Court for the Southern District of New York on October 18, 19, 20, 21, 24 and 25, 1955.

After all the evidence of both parties had been presented, the Court submitted the case to the jury with directions to bring in a general verdict accompanied by answers to special interrogatories—(the special interrogatories having been worded by the Court and consented to by counsel for both parties to the action).

After deliberating approximately eight hours, the jury returned with a general verdict in favor of plaintiff-appellant in the sum of $55,000 and simultaneously, the jury returned with answers to all the special interrogatories which were consistent with their general verdict.[1]

---

[1] The Clerk: Mr. Foreman, have you agreed upon a verdict?
The Foreman: We have.
The Clerk: How do you find?
The Foreman: Do you want me to read it, your Honor?
The Court: Yes.
The Foreman: "Miller v. Farrell Lines Company.
"First: Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"
The answer is no.
"Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,
"(a) Was James W. Miller alive at that time?"
The answer is yes.
"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?"
The answer is no.
"Third: In addition to answering the above questions, please report your verdict as follows:
"For the defendant"—No.
"Plaintiff"—Yes.
"(a) Amount, if any, awarded for the pain and suffering of James W. Miller." None.
"(b) Amount, if any, awarded for the pecuniary loss to the widow." $10,000.
"(c) Amount, if any, awarded for the pecuniary loss to the child." $45,000.

The Court then, within minutes after the jury verdict, upon motion of defendant-appellee, set aside this jury verdict and directed a verdict for defendant-appellee.

Judgment was entered on October 26, 1955 and the reformed and resettled judgment was filed on January 5, 1956 *nunc pro tunc.*

Questions Presented

1. Did the Trial Court deprive the plaintiff of her Constitutional right of trial by jury when it set aside the general verdict of the jury in favor of the plaintiff, after the jury, in answer to special interrogatories, found the Master of the vessel negligent in failing to take proper and efficient means to effect a rescue and after the jury decided that said negligence contributed at least in part to the death of plaintiff's decedent in this Jones Act case?

2. Did the Trial Court err when he substituted his judgment of the facts in place of the findings of fact of the jury which answered special interrogatories consistent with their general verdict in favor of the plaintiff and when he thereupon set aside the jury verdict and directed a verdict for the defendant in this Jones Act case where the evidence and the reasonable inferences to be drawn therefrom were such that fair-minded men might reach different conclusions?

Statutes and Rules

TITLE 46 U. S. C. § 688

"*§ 688. Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of

the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185: June 5, 1920, c. 250, § 33, 41 Stat. 1007."

TITLE 45 U. S. C. § 52

"§ *52. Carriers in Territories or other possessions of United States*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 2, 35 Stat. 65." (Italics ours.)

Federal Rules of Civil Procedure

"RULE 50. MOTION FOR A DIRECTED VERDICT.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"Rule 49. Special Verdicts and Interrogatories.

* * *

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

United States Constitution

AMENDMENT VII—CIVIL TRIALS

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Facts

James W. Miller (plaintiff-appellant's decedent in this action) signed shipping articles on the S.S. "African Glade" on November 10, 1950 as assistant electrician (88). He disappeared at sea during a voyage on the night of November 14-15, 1950 (102). He was given up as lost at sea when darkness set in on November 15, 1950 (102).

He was a naturalized American citizen (14) sailing under the American flag on a ship owned, operated and controlled by the defendant-appellee, an American corporation.

He was born in Scotland in 1914 (7) and had followed the sea as his life's calling since 1928 (Ptf. Ex. 7—R. 12) when he started as an apprentice. During the course of his career he rose from apprentice seaman to Master of British ships (Ptf. Ex. 5—R. 11). After service on British ships, he came to America, started in the engine department and served successively as wiper, oiler and then fireman-water tender. On November 3, 1950 he graduated from a United States Maritime Service School as a qualified Assistant Electrician (Ptf. Ex. 31A—R. 132) and signed shipping articles on November 10, 1950 on the S.S. "African Glade" for his first and last voyage as an assistant electrician. He also had completed correspondence courses in radio, electronics and allied fields (Ptf. Ex. 15—R. 27) and had studied for Third Assistant Engineer at a private maritime school although he had not, as of November 15, 1950, sat for a license as Third Assistant Engineer.

On May 25, 1946 he married the plaintiff-appellant, an American citizen born in 1925. On December 2, 1947 their son Michael was born in Baltimore, Maryland (7). He was survived by his wife and son.

The S.S. "African Glade" was a C-2 type freighter (92) (174). After signing on her full complement of crew and embarking her 11 passengers, she set sail from New York

in the evening of November 10, 1950 on her course for Dakar, West Africa, her first port of call (77). The voyage was on a trade route of the Atlantic Ocean regularly used as a shipping lane or highway for United States to West Africa commerce (354).

With respect to the first count of negligence (commonly called "neglect to treat") the plaintiff called as a witness Chief Electrician Kenneth O. Levy, decedent's superior (153) and roommate (154). Levy testified that Miller had not slept in his bed for two consecutive nights (the nights of November 13-14 and November 14-15) (199); that Miller was quiet (230); that Miller shared a bottle of rum with another seaman on the night of November 12 (193); that Miller asked Levy for a cigarette although Miller had originally told Levy that he had given up smoking (231).

Chief Steward Aiken, on behalf of the defendant, testified that there was nothing unusual about Miller in all of his contacts with him although he did admit he saw Miller pacing the deck on the night of November 14 about 11:30 P. M. (562), which was the last time Miller was seen alive on the vessel (573).

The jury, by their negative answer to Interrogatory First, decided this issue of fact of "neglect to treat" against the plaintiff on the first count of negligence.

With respect to the second count of negligence (commonly called "failure to rescue"), the plaintiff called as witnesses (in addition to Chief Electrician Levy), Captain Wilder (Master of the S.S. "African Glade") (76) and Captain Feinne, a Master-Mariner and maritime expert (323). Captain Wilder's testimony was presented by his deposition (Court Ex. 1—R. 163) originally taken by the defendant.

Captain Wilder testified that he was informed at 10:20 A. M. on November 15 of the fact that Miller was apparently not on board the ship (79); that he caused search-

ing parties to be sent to various parts of the ship (79); that simultaneously he turned the ship about on a reverse course as he believed Miller had fallen over the side (79); that he interrogated only Chief Electrician Levy (113), Chief Steward Aiken (114) and First Assistant Engineer Crowell (115); that he learned from Aiken that Aiken last saw Miller alive at 11:30 P. M. on November 14; that he assumed from Levy's information that Miller disappeared prior to 6 A. M. on November 15 (102); that he did not interview the entire crew (115) nor any of the passengers concerning Miller's disappearance; that he sent only one telegram to a U. S. Coast Guard Weather Ship (79) and had no further communication with the U. S. Coast Guard; that he did not communicate with any other ships in the ocean track though it was a trade route; that he did not require the navigating officer, Second Mate Ware, to obtain any "fix" of "position" at any time during the day of November 15; that he called off the search at 5:16 P. M. on November 15 when darkness set in; that he did not use the searchlight of the ship though it was available; that the vessel traveled approximately 165 miles between 11:30 P. M. November 14 and 10:30 A. M. November 15 (99); that the vessel traveled approximately 95 miles between 10:30 A. M. November 15 and 5:16 P. M. November 15 (99); that the air temperature varied from 77° at noon of November 14 to 76° at noon of November 15 and at midnight of November 14-15 it was 74° (111).

Captain Feinne, plaintiff's maritime expert, testified that, according to the known positions of the ship as given in the ship's log, the Master (Captain Wilder) *had not* reversed course on a *reciprocal* course but *had* reversed course on a *parallel* course and was twelve to thirteen miles south of a reciprocal course (343) (461); that the Master had not returned on his own track (346) (397); that a competent master would return to a position where Miller was last known to be alive (349); that upon reaching that position a competent master would perform a search pattern

with the ship (359); that a competent master would radio other ships on this trade route or ocean "highway" (354); that a competent master would be in frequent communication with the U. S. Coast Guard; that a competent master would have the navigating officer check the ship's position during the search and try to establish by celestial navigation where the ship was (344); that a competent master would interrogate all crew members (359) and passengers to learn as much as possible about the disappearance; that a fall from the after-end of the vessel could or could not cause injury (472); that a person falling from the after-end of the vessel would not be caught up in the propeller (488).

In answer to the hypothetical question (373-376) by plaintiff's counsel, Captain Feinne testified that in his expert opinion Captain Wilder did not make a competent and efficient search (376).

In the conflict between the testimony of Capt. Wilder and Captain Feinne, the key issues of fact were laid bare—Did the ship's Master fail to take efficient and proper means to effect a rescue? Was this failure of the ship's Master the cause, at least in part, of plaintiff's decedent's death?

The conflict on these issues of fact was further enhanced and magnified by testimony on behalf of defendant by its witnesses Capt. Sheridan (662-745) and Capt. Umstead (745-761), both Master Mariners and maritime experts, and Officer Ware (593-661), Second Mate of the S.S. "African Glade", who was the navigating officer during the voyage.

Capt. Sheridan answering a lengthy hypothetical question on direct examination by defense counsel testified that the action taken by the ship's Master "was a proper and seamanlike search" (683-685). Capt. Sheridan testified on cross-examination that it wouldn't matter what the ship's position was at the start of the search (715) and that it is "immaterial" to learn where you are or were at the time of making your search (717). Capt. Sheridan did admit

on cross-examination that the navigating officer on November 15 could have taken "fixes" (723).

Capt. Umstead testified on direct examination by defense counsel that in his opinion the ship's Master followed "a correct navigational and seamanlike procedure" in the search (751).

Capt. Umstead, like Capt. Sheridan, testified on cross-examination that it doesn't make any difference where you are on the ocean when you are looking for a man as in this case (760).

But Capt. Umstead did admit that in an emergency such as in this case "you always want to know where you are" (760). Second Mate Ware testified that the ship returned on a reciprocal course (644).

In rebuttal Capt. Feinne testified that a competent master would use every known method to establish his position and learn his course (772). In response to a question by the Court, Capt. Feinne testified that without a fix and without having definite information as to the course over the ground nobody running a ship can possibly turn a reverse course and follow a reverse course (779).

The Trial Court in the charge to the jury recognized the vital existence of these key issues of fact. Indeed the Court with painstaking detail set forth the jury's duty to decide between the maritime experts on the issue of adequate search and to determine whether (assuming the jury found the search was inadequate) this inadequate search was the proximate cause, at least in part, of Miller's death (872-875).

LAW

POINT I

The basis of recovery in an action under the Jones Act is negligence and failure to perform an efficient rescue is a negligent act.

The Jones Act, 46 U. S. C. Sec. 688, expressly extends to a seaman (or his personal representative, in case of death) who suffers injury or death during the course of his employment the right of action which the Federal Employer's Liability Act, 45 U. S. C. Sec. 51 *et seq.* confers upon railway employees. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. It follows therefore that negligence is the basis of a seaman's action for damages under the Jones Act. *Jamison* v. *Encarnacion,* 281 U. S. 635.

Judge Frank said in discussing the concept of negligence in *Koehler* v. *Presque-Isle Transp. Co.,* 141 F. 2d 490 (2 Cir. 1949):

> "We think it [negligence] includes any knowing or careless breach of any obligation which the employer owes to the seamen. Among these obligations is that of seeing to the safety of the crew."

One of the most ancient obligations of the vessel has been and is, the obligation to rescue a seaman fallen overboard during a voyage. In *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377 the Supreme Court said:

> "There is little doubt that rescue is a duty when a sailor falls into the sea"

citing *U. S.* v. *Knowles,* 4 Sawyer 517, 26 Fed. Cas. 800, Case No. 15540.

Judge Field, in 1864, in the *Knowles* case said:

> "Now, in the case of a person falling overboard from a ship at sea, whether passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue in case he should by accident fall or be thrown overboard."

In addition to affirming that the duty to rescue is a duty of the vessel, the Supreme Court in the *Cortes* case went on to say

> "and that a liability to respond in damages is cast upon the shipowner if he (a sailor) is abandoned to his fate."

Certainly in the instant case the duty to rescue existed not only by tradition, not only by law, but most important it existed in the mind of the Master of the vessel himself as evidenced by his answer to the question concerning

what he did when he was informed on November 15, 1950 at 10:20 A. M. of Miller's absence (79).

> "Q. What else did you do? A. When they reported to me that they could not find him, I turned the vessel around on its course, and following the track back on a 180-degrees change, *we began searching for Miller, as I believed he was not on board and had fallen over the side.*"

It is fundamental that in order to establish negligence under the Jones Act, there must be a duty and a breach of that duty and the breach must contribute "*in whole or in part*" to the injury or death of the seaman.

The duty in the instant case was the duty to rescue (329). Even defendant's counsel conceded this in his argument on his motion for a directed verdict at the close of plaintiff's case (516).

Was there a breach of this duty? The appellant contends that this question is an issue of fact to be determined by the jury.

The Trial Court, after a deep and thoughtful search of conscience, indicated, upon the argument of defendant's motion for a directed verdict at the close of plaintiff's case, that he agreed with appellant's view that the question of the breach of duty (by an inefficient and improper rescue attempt) was an issue of fact for the jury to determine (525, 526, 530, 535, 536), though the question was not free from doubt in the Court's mind (534) but unfortunately, after the jury verdict was announced, the Trial Court veered away from the sound views he had previously expressed concerning the jury's function and granted defendant's motion for a directed verdict (899).

It would seem that the doubt expressed by the Trial Court should be set at rest in view of the language in the decision of the U. S. Supreme Court in *Schulz* v. *The Penn-*

sylvania Railroad Co., 350 U. S. 523 (April 9, 1956), which was the most recent pronouncement of the doctrine concerning the jury function which has been evolved by the Supreme Court since *Jones* v. *East Tennessee V. & G. R. Co.*, 128 U. S. 443 (1888); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, and most particularly in *Lavender* v. *Kurn*, 327 U. S. 645.

In the *Schulz* case Judge Black speaking for the majority said:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, theretofore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445 (1888)."

At this point it may be well to point out that even assuming there were no duty to rescue, it is well settled that a volunteer must perform an undertaken task in a careful

and prudent manner even though he need not have volunteered in the first place. [Certainly a Master, who turns his ship about and travels 95 miles in search of a sailor fallen overboard, is a volunteer.]

In *Moch* v. *Rensselaer Water Co.*, 247 N. Y. 160, Chief Judge Cardozo enunciated the law on volunteers:

> "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all."
>
> "It is ancient learning that one who assumes to act, even though gratuitously may thereby become subject to the duty of acting carefully, if he acts at all."

See also *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473.

Whether the Master in the instant case was acting as a volunteer or was acting under an affirmative duty to rescue, it was for the jury to determine whether the Master acted in a careful and prudent manner. The jury could accept or reject the expert opinion and testimony on either side based as it was on the experts' experience, the ship's log and the ship's positions contained therein, the charting of the ship's voyage and the admitted acts of the Master. The jury chose to believe the plaintiff's expert and therefore they answered interrogatory 2(b) in the negative on the issue of whether the Master took all proper and efficient means to effect a rescue.

Thus, the first key issue of fact, namely, whether the ship's Master failed to take efficient and proper means to effect a rescue, was properly a jury question and was decided by the jury in favor of the plaintiff.

The second key issue of fact is whether the breach of the duty contributed "*in whole or in part*" to Miller's death and this issue too was properly a jury question. It

is not incumbent upon this plaintiff under the Jones Act to prove that the breach of duty was the sole cause of the death. The plaintiff herein must succeed if the breach of duty contributed even "*in part*" to Miller's death. *Schulz* v. *The Pennsylvania Railroad Co.*, cited *supra* and 45 U. S. C. Sec. 52, 46 U. S. C. Sec. 688.

In the *Schulz* case the Supreme Court delineated the jury function in this language:

> "In this case petitioner is entitled to recover if her husband's death resulted '*in whole or in part*' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and *under-manned* boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties.[6] But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences.[7] For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.'[8] Fact finding does not require mathematical

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[6] Cf. *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784.

[7] *Johnson* v. *United States*, 333 U. S. 46.

[8] *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. Conversely, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Ibid.*

certainty.[9] Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

"We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

It is appellant's contention that it was the function of the jurors to decide this second key issue of fact since from the evidence adduced, they would be justified in finding *as they did* that Miller was alive at the start of the search and that a Master who was 12 to 13 miles south of the correct reverse course and who only communicated with the U. S. Coast Guard weather ship once during the entire search and who did not attempt to communicate by radio with any other ships in this well-traveled trade route and who did not ascertain accurately the course he had been on nor the reverse course he was following, certainly *contributed at least in part* to Miller's death.

It is no answer (to the problem of whether it is properly a jury function to determine the second key issue of fact in this case), to say that the exercise of the jury function involves a measure of speculation and conjecture. In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court, in discussing this very question said at page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by

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[9] *Lavender* v. *Kurn*, 327 U. S. 645, 653.

> choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The *Lavender* decision applies with equal force to cases under the Jones Act. *Cox* v. *Roth*, 348 U. S. 207 (1955).

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949), a verdict for plaintiff was affirmed and among other things Judge Swan said at page 327:

> "It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * But almost every verdict of a jury involves the element of speculation or conjecture to some extent."

Then at page 328 Judge Swan stated:

> "* * * In our opinion the causal relation between the negligence and the death was a question for the jury."

See also:

Wilkerson v. *McCarthy*, 336 U. S. 53 (1949);
Stone v. *New York C. & St. L. R. Co.*, 344 U. S. 407 (1953);
Blair v. *Baltimore & O. R. Co.*, 323 U. S. 600 (1945);
Johnson v. *Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir., 1945);
McDonough v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N. D. Ohio, 1951).

POINT II

The submission of written interrogatories by the Trial Court to the jury pursuant to Rule 49(b) of Federal Rules of Civil Procedure was determination by Trial Court that issues of fact existed in the instant case.

The Trial Court in an honest endeavor to resolve the doubt existing in his own mind, consciously and with full knowledge of the meaning and import of Rule 49(b) F. R. C. P. conceived and drafted the written interrogatories which were submitted to the jury after the exact language of the interrogatories was agreed upon and consented to by counsel for both parties and the Court.

Certainly the appellee will not dispute that Interrogatory First, addressed to "neglect to treat" was an issue of fact. Especially in view of the fact that the jury answered Interrogatory First in favor of appellee.

Can the appellee or the Trial Court dispute that Interrogatory Second addressed to "failure to rescue" was any less an issue of fact merely because the jury answered both parts of Interrogatory Second in favor of appellant and rendered a consistent general verdict in favor of appellant?

In *Pacific Greyhound Lines* v. *Zane*, 160 F. 2d 731 (9 Cir. 1947), at page 737 the Court said:

> "The Federal Rules of Civil Procedure, Rule 49, were designed to encourage and facilitate the use of the special verdict, or, in the alternative, the general verdict accompanied by answers to interrogatories as to *issues of fact.*"

See also *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54, 67 (2 Cir. 1948).

Another point which must necessarily be recognized is that even though the Interrogatories submitted to the jury do not include a question whether violation of a statute was the proximate cause of the accident, the general verdict in favor of plaintiff constitutes a sufficient finding of such connection. See *Bolan* v. *Lehigh Valley R. Co.*, 167 F. 2d 934 (2 Cir. 1948).

The very purpose of Interrogatories submitted to a jury pursuant to Rule 49(b) F. R. C. P. is to determine what facts are found by the jury as a basis for their general verdict. It is especially necessary to have interrogatories in a wrongful death action such as the instant case since the jury can only come to a conclusion upon the basis of the testimony of the living crew members, the expert witnesses and the physical facts and inferences to be drawn from all this testimony. The lips of the one who could tell what actually happened are sealed forever and the occurrence must be reconstructed from the evidence gleaned from the best available sources.

In the absence of the decedent, there inevitably must be differing conclusions which reasonable men may reach because the jury brings to the deliberation room their varied backgrounds and experiences which any twelve people must have. It was to aid these twelve people in their deliberations and to insure that they performed their function properly that the Trial Court in the instant case submitted

to them written interrogatories. This act of the Trial Court was a determination by the Trial Court that issues of fact did exist which had to be resolved by the jury.

As conscientious as the act of the Trial Court was in submitting interrogatories to the jury so grievous was the error of the Trial Court in casting aside and obliterating the jury's answers to the interrogatories by directing a verdict for the defendant-appellee in complete disregard of the findings of fact of the jury. In committing this grievous error the Trial Court deprived the plaintiff of her right of a jury trial under the Seventh Amendment.

See *Galloway* v. *U. S.*, 319 U. S. 372 (1943) and *Schulz* v. *Pennsylvania Railroad Company*, cited *supra*.

POINT III

Under Rule 50 of Federal Rules of Civil Procedure a motion for a directed verdict may not be granted when reasonable men may differ as to what the verdict should be on the evidence.

Just when a Trial Court may grant a motion for a directed verdict has been discussed by various courts using different words but all expressing the same fundamental principle. Perhaps the clearest pronouncement of this fundamental principle is found in the Supreme Court opinion in *Gunning* v. *Cooley*, 281 U. S. 90 (1929) where the Court said at page 94:

> "Where uncertainty as to the existence of negligence arises from *a conflict in the testimony* or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & Danville Railroad v. Powers, 149 U. S. 43, 45." (Italics ours)

See also

Di Nicola v. *Pennsylvania R. Co.*, 158 F. 2d 856 (2 Cir. 1946);

Zinnel v. *U. S. Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47;

Mattson v. *Central Electric & Gas Co.*, 174 F. 2d 215;

Galloway v. *U. S.*, 319 U. S. 372, 395 (1943).

In *Tennani* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944) at page 35, the Court stated:

> "* * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

In the instant case there certainly existed a conflict in the testimony between the experts as to whether the vessel's Master performed the attempted rescue in a competent manner; as to how long a person could be expected to survive in the particular area of the Atlantic Ocean affected as it was by the Gulf Stream; as to whether plaintiff's decedent was injured upon leaving the vessel and entering the water and as to whether the vessel was on a parallel

reverse course or a reciprocal reverse course during the rescue attempt. There were also conflicting conclusions which could have been drawn by the jury from the testimony of Chief Electrician Levy and Chief Steward Aiken with respect to whether plaintiff's decedent was mentally disturbed during the five days of the vessel's voyage by reason of the fact that Miller did not sleep in his bed for two consecutive nights and renewed the smoking habit and drank some rum on one night. The jury in answering Interrogatory First in the negative resolved this conflict concerning Miller's mental condition. In their answers to Interrogatory Second the jury resolved the conflict of testimony between the experts and the jury concluded that the negligence of the defendant caused, at least in part, the death of plaintiff's decedent. While the Trial Court may have reached conclusions opposite to that of the jury and may have differed with the ultimate findings of fact of the jury, he committed error when he directed a verdict for the defendant-appellee in the face of the very existence of differences between the Trial Court and the jury.

In *Mattson* v. *Central Electric & Gas Co.*, 174 F. 2d 215, the court expressed the applicable law in these words at page 217:

> "To warrant the direction of a verdict the evidence must be such that all reasonable minds can come to only one conclusion on the facts. When minds may reasonably differ as to what the verdict should be on the evidence, the cause should be submitted to the jury. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720."

CONCLUSION

It is respectfully submitted that the judgment directing a verdict in favor of defendant be reversed and that the verdict of the jury in favor of the plaintiff be reinstated and that a judgment upon the jury verdict in favor of the plaintiff be entered and that plaintiff be granted such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

HERBERT J. KAPLOW,
Attorney for Plaintiff-Appellant.

APPENDIX

United States Court of Appeals

For the Second Circuit

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant,

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

Statement Under Rule 15(b)

Action for damages for wrongful death pursuant to the provisions of the Jones Act, 46 U. S. C. § 688.

Action was commenced by filing of a summons and complaint on *Jan. 11, 1952.* The answer was filed on *Feb. 16, 1952.*

Trial was held before the Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York and a jury in New York, N. Y., on Oct. 18, 19, 20, 21, 24 and 25, 1955.

The Court directed a verdict for the defendant after setting aside the jury verdict in favor of plaintiff in the sum of $55,000.00.

Judgment was entered on October 26, 1955 and was re-settled nunc pro tunc on January 4, 1956 and entered on January 5, 1956.

Notice of appeal was filed on *Nov. 22, 1955.*

Appeal was docketed on *April 9, 1956.*

There has been no change of parties or attorneys in this action.

Original Judgment

(Record, pages 913, 914)

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Hon. Edmund L. Palmieri and a jury on Oct. 18, 19, 20, 21, 24 and 25, 1955, and the Court having directed a verdict in favor of the defendant, it is

ADJUDGED: That the defendant have judgment against the plaintiff.

Dated, New York, October 26, 1955.

WILLIAM V. CONNELL,
Clerk.

Resettled Judgment

(Record, pages 929, 930)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiff by her attorney, Herbert J. Kaplow, Esq., having moved this Court by Notice of Motion dated December 13, 1955, for an order resettling nunc pro tunc the judgment heretofore entered in this case on October 26, 1955, and said motion having come on to be heard in this Court on the 4th day of January, 1956, and the plaintiff having appeared by Herbert J. Kaplow, Esq., and the defendant having appeared by Stapleton, Flynn & Lilly, Daniel Flynn of Counsel, having consented thereto, it is hereby

ORDERED, that the judgment heretofore entered in this action on October 26, 1955, is hereby amended nunc pro tunc to read as follows:

"The issues in the above entitled action having been brought on regularly for trial before the Hon.

Resettled Judgment

Edmund L. Palmieri and a jury on October 18, 19, 20, 21, 24 and 25, 1955, and the defendant having moved for a directed verdict at the close of the plaintiff's case and the Court having reserved decision thereon and the defendant having renewed its motion at the close of the defendant's case and the Court having reserved decision thereon and the jury having rendered a verdict in favor of the plaintiff in the sum of $55,000.00 and the defendant having moved to set aside the jury verdict and the defendant having again renewed its motion for a directed verdict, made at the close of the entire case, and the Court having granted defendant's motion to set aside the jury verdict and the Court having granted defendant's motion for a directed verdict in favor of defendant, it is

ADJUDGED, that the verdict of the jury in favor of the plaintiff in the sum of $55,000.00 is set aside; and it is further

ADJUDGED, that a verdict is directed in favor of the defendant, and it is further

ADJUDGED, that the defendant have judgment against the plaintiff.

EDMUND L. PALMIERI,
U. S. D. J.

Dated: New York
January 4, 1956.

Excerpts from Testimony

Capt. Theodore I. Feinne—For Plaintiff—Direct

[328] The Court: Well, let me say this to the jury [329] right now in order to avoid these excursions into the law and into what you are going to be charged because I don't think that it is a good plan to argue the case when you are taking the evidence—that should be done at the close of the case—the basic rule is that the master of the ship should take proper and efficient means to effect a rescue of a seaman who has fallen overboard from any cause whatever, and it may be that one of the questions in this case that you may be called upon to decide will be whether, in this case, the master of the ship took proper and efficient means to effect a rescue.

Now, I think that that is all I need tell you at this time.

* * *

[338] Q. Does that indicate he was sailing 118 degrees true? A. According to this layout, according to the position taken over this log book of November 14th, and the position of his fix which was taken by some bodies, the sun, the moon, stars or planets, on November 15th, he was sailing a course of approximately 120 degrees true instead of 118.

* * *

[343] Q. In other words, he was 13 miles away from where he thought he was? A. He was 13 miles further south than 118 true course, according to his fix.

Q. So that when he made that turn around he was off his course, wasn't he? A. He wasn't on a 118. He was between 12 and 13 miles further south than what he thought he was.

* * *

[349] What in your opinion would a competent master have done as the first step, right then and there? A. I would have broke out every member of the crew. I would have had the master to broke out every member of the crew and would have instituted a search. He would have placed lookouts on various advantageous points aboard ship. He would have broke out his navigator if he was asleep or officer on watch. He would have had to plot his position at approximately 11.30, the last time, when he found out the last time he was seen, ascertain that; would have ascertained his position or the area where the man was last seen and would have put it on his chart.

Q. In other words, one of the very first things in your opinion that a competent master would do would be to ascertain the position of the vessel as of when the man was last seen aboard the vessel, is that correct? [350] A. That is true. That is one of the first things.

Q. By the way, did this vessel—did you plot that on this map, the 11.30 position of when he was last seen aboard? A. I did it this way, by taking his fix.

Q. Did you? A. Yes, sir, I did.

Q. Now, did this vessel ever return to the place where Mr. Miller was last seen on board the vessel; did the vessel ever return to that point? A. According to his log book he returned only to this point (indicating).

Q. When you say "this point,"— A. Measured on the chart it was about—

Q. What do you mean? A. —about 42 to 45 miles away from the last area the man was known to be seen.

Q. So he never did return, as a competent master should, in your opinion, to the point where the man was last seen alive? A. No. According to his log book, no.

Q. Now let us get to the search itself. In addition to making out the crew and having—incidentally, this investigation that you described, that would be going on while

the vessel would be [351] turned back, wouldn't it? A. That is true, sir.

Q. In addition to that, and in addition to making your position as of the time when the man was last seen, what other steps, in your opinion, would a competent master take in his search? A. He would have immediately had his navigating officer look up, or another officer on the bridge, look up his track chart.

* * *

DEFENDANT'S MOTION FOR DIRECTED VERDICT

[525] The Court: Isn't that precisely why we have a jury?

Mr. Flynn: Not to speculate.

The Court: Isn't that precisely why we have taken all the proof in this case?

Isn't it up to the jury to draw whatever reasonable inferences they believe are proper under the admissible proof in order to ascertain the nature of his disappearance, and in order to ascertain whether, under the circumstances of his disappearance, the search was diligent and proper?

Mr. Flynn: If your Honor please, you have got to go further. You have got to have here some showing that a rescue effort could have been successful. In other words, there has got to be some affirmative proof that a rescue of this man—

The Court: If they believe everything that Captain Feinne said and excluding any inferences favorable to you, drawing all of the inferences most favorable to the position of the plaintiff in this case, and accepting at full value everything that [526] Captain Feinne said, could they not come to the conclusion that a diligent and proper search might have saved him and that a diligent and proper search—and that there was not a diligent and proper search in this case?

Could they not come to that conclusion?

* * *

Defendant's Motion for Directed Verdict

* * *

[530] The Court: But you have the expert testimony of Captain Feinne from which the jury could infer, could it not, that Miller was alive when the alarm was given, and his disappearance had been discovered, and that he could have remained alive throughout all of the hours of that search, and he could have been found alive. If they believe that testimony would they not be entitled to come to the conclusion, on the basis of the most favorable inferences to be drawn from Captain Feinne's testimony, that the missing seaman Miller was alive and that a proper search would have discovered it? Would they not be entitled to do that?

Mr. Flynn: We cannot speculate on that.

The Court: No, no, but where you don't have affirmative proof or tangible proof of a factual element in a case, and it is supplied by expert testimony, can the jury not infer from that expert testimony those facts which are necessary to form the link of evidence between the overt or tangible proof that we have and the evidence which is not affirmatively proven, and isn't it precisely—

* * *

[536] The Court: If everything that Captain Feinne testified to is accepted by the jury and the most favorable inferences are drawn from that testimony, and any inferences favorable to you are excluded from that testimony and it is within their province to do just that, it would seem to me that they might very well come to the conclusion that things were done which should not have been done and other things were done which might not have been done.

However, I think your first two points go to the heart of the case and I should give them further consideration, and I am disposed to reserve decision.

* * *

Capt. Charles E. Umstead—for Defendant—Cross

[760] Q. Would you consider a man being reported overboard or missing or disappearing from the vessel at sea some four days out of New York as an emergency? A. A man overboard? A man overboard is always an emergency.

* * *

Q. Would you think it important to attempt to take bearings or fixes when you had a partly cloudy sky, to find out where your position of your vessel was in an emergency? A. In an emergency or at any other time you always want to know where you are.

* * *

New York, October 25, 1955,
10 o'clock A. M.

[840] (Jury in the box.)

(Mr. Flynn summed up to the jury.)

The Court: Ladies and gentlemen, do you wish to have a short recess now or do you prefer to hear the other summation? I think one or two of you would like a recess. All right, we will have a short recess.

(Jury out of box.)

(Short recess.)

(Jury in the box.)

The Court: Proceed.

(Mr. Kaplow summed up to the jury.)

The Court: Now, ladies and gentlemen, I wish to take a short recess because there are certain questions I am going to put to you at the conclusion of my charge which I have just drafted, and I want to show them to counsel before I undertake the charge.

[841] Please feel free, if you wish to withdraw, to do so, and come back to your seats informally as soon as you have taken any time you wish, and I will give you the charge whenever you are ready.

Charge of the Court

(Jury out of box.)

(Recess.)

(The following took place in the robing room.)

(Discussion off the record.)

The Court: Before charging the jury, I have shown to counsel for both sides the two questions which I believe the jury should be asked to answer, which I have had prepared in typewritten form, of which I have given them a copy, as well as the form of the verdict which I believe the jury should return in this case.

After some discussion and the making of a change in one word with respect to Question Second, subdivision (a) I believe counsel are in agreement that this is fair and proper under the circumstances and are not taking any exceptions thereto.

Is that right, gentlemen?

Mr. Kaplow: That is correct, your Honor.

Mr. Flynn: That is correct.

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[842] CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury, we have now reached the very important part of the case in which the responsibility for determining the facts passes to you.

The law, under our procedures, consigns to you, without reservation, a very grave and stupendous responsibility, that of ascertaining the facts in the case and of deciding from the controverted facts where the truth lies.

You are the sole and exclusive judges of the facts. You bring to the court room an essential contribution, that of your mature judgment drawn from varied experiences, from varied occupations, from varied attitudes and educational backgrounds, and the sum of that maturity, that experience, constitutes a precious and essential element of the justice which we administer.

You are to determine those facts under the applicable rules of law which I am going to charge you, and you are bound by oath to follow the rules of law which I charge.

Now, if any facts are referred to by me, [843] please do not attach any special significance to those facts. I have great respect for the conscientiousness, the wisdom and the practicable utility of the jury verdict. You are entitled to the opinion that there are facts to which I have not referred and which may be more important than the facts to which I have referred.

If I have asked any questions of any witnesses, I have done so purely out of a desire to further the conscientious and thorough search for the truth. I have had no other purpose, and you must attribute none to me.

Now, before getting into the heart of the case, I should like to dispose of one or two preliminary matters. I owe you a vote of thanks for your very careful attention to the evidence, for your prompt attendance at the sessions of the Court in what has proven to be a rather long and a rather difficult case.

I owe a vote of thanks to the attorneys for their competence, for their skill, for their courtesy to each other, to you and to me.

If I have had any colloquy with counsel during the course of the trial, please disregard that. Necessarily, in the course of a trial, the Judge must [844] engage in exchanges with attorneys. It is inevitable. It is part of the procedure in which we engage, and each attorney should try, just as these attorneys have tried, to represent to the best of his ability the point of view of his own client. It would be wrong if it were otherwise.

And if I have made any rulings or made any statements in connection with those rulings, you must not be concerned with them except to the extent that evidence was admitted. You must be guided solely by the evidence which was ad-

mitted, the testimony which you heard and which was given by the witnesses who appeared before you, the stipulations and concessions of counsel which constitute valid evidence, and the various exhibits, papers, which have been admitted into evidence.

I might say in that respect that with regard to the deposition of Captain Wilder, which has been marked a Court exhibit, it was solely for the purpose of guiding me in following the reading of that deposition. Actually, if in the course of your deliberations you should see fit to have the Court refer to you any exhibits or any testimony in the case, and you have that right, you would be referred in the case of Captain [845] Wilder to the portions of the deposition which were read into the record. Most of it was. There were certain parts of it which for legal reasons could not be read in, but which I believe were quite unimportant.

So that if you should need to refer to that part of the case, to that deposition, the deposition to the extent that it was admissible has been admitted into the record.

Therefore, before talking to you again about equality of justice, which is so important, let me emphasize that when you retire to the jury room you must divest yourselves of any personal impressions connected with the lawyers or the Judge. You must consign your conscientious attention, as I know you will, to the proof in the case, the admissible evidence in the case, and decide the case and render your verdict on the basis of that proof under the rules of law which I am going to charge you.

As I say, it is so important that you regard the parties to this litigation, as indeed you should regard the parties to any litigation, as being on a completely equal footing. It is true that we have a corporation here as one defendant and we have a woman as a plaintiff, who is a widow of a seaman [846] who has disappeared at sea. You must

not permit questions of sentimentality to enter into your verdict. You are not permitted by law to reach your conclusions out of sentiment or out of sympathy. You must do so only within the confines of the rules prescribed by law. It would be just as wrong for you to apply different sets of laws to different people because they have different names or different colored hair as it would for you to apply a different kind of law between the two sides of this case because one is a corporation and one is an individual.

Your feelings, just as my feelings, can have nothing to do with the conclusion which you are bound by oath to adopt.

Now, what have we here? This is a civil suit, and Mildred Miller is asking for a sum of money under a law known commonly as the Jones Act. It is an act of Congress passed in 1920, and under this Jones Act a seaman who is injured in the course of his employment, as well as the personal representative of the seaman who dies as a result of injuries received in the course of his employment, is entitled to maintain an action at law for damages with the right to trial by jury.

[847] But remember—and this is so important in this case—the recovery for damages is for negligence. The gist of this action under the Jones Act is negligence. In order to maintain an action under this Federal statute which I have just referred to negligence must be alleged and proved, and unless the seaman or the personal representative of a seamon—in this case Mrs. Miller—can establish the negligence of the owners of the vessel or the officers, agents or employees, no liability exists.

What do we mean by negligence? Negligence is the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such a person under those circumstances would not have done.

Let me give you a ridiculous example, because sometimes ridiculous examples serve to illustrate a point better than one that is not. Suppose a man is very high up in a skyscraper in New York City and there are doors which look like elevator doors, and they have buttons which look like electrical buttons next to them, and one of the doors has a great big sign saying "Danger—Do Not Open," and this man pushes all the buttons and an elevator does [848] not appear, and finally he becomes impatient so he kicks at the door marked "Danger" and sees that it can be opened easily. So he opens the door and steps into a shaft and then hurts himself.

Obviously that man has done something a prudent man should not do, and he would be negligent under those circumstances.

There are all kinds and gradations of negligence, and you have got to be careful to apply the rule to the facts of the case. You have got to place yourself here in the position of the people who have been charged with being negligent. I will tell you more about that in a moment.

But there are two principal bases for the claim of negligence in this case and I will tell you about that. One has to do with the alleged manifestations of signs of mental disturbance on the ship between November 10th and November 14th, 1950. The other has to do with the action of the master, his associate officers and crew after the alarm of disappearance had been given.

But I will tell you more about that in a minute.

Let me dispose of another preliminary matter. Paragraph 9 of the complaint reads:

> [849] "Plaintiff's decedent left him surviving his wife, Mildred L. Miller, the plaintiff and administratrix herein, and their son born December 12, 1947, both of whom were dependent upon decedent and both of whom have suffered damages."

The statement has been formally alleged and proof has been submitted as to that relationship and the law provides that a widow and a surviving child can claim pecuniary damages for pecuniary loss. I will tell you about that at the conclusion of my charge.

But certain other essential findings have to be made by you before you can reach the question of damages, and I repeat, you have got to find that very crucial matter of negligence. That element of negligence has to be found, and the way you find it is extremely important and I will tell you more about that.

As you have heard on a number of occasions throughout this trial, James W. Miller was a member of the crew of the S.S. African Glade, a freight ship, which carried a limited number of passengers. They had eleven passengers on this particular trip, as I recall. It is owned, operated and controlled by Farrell Lines, Inc., the defendant in this case. [850] It was a vessel of about 6,000 tons displacement, known in shipping circles as a C-2 type. You have seen a lot of photographs of the type. Then there has been this illustration of it here which has been before you throughout most of the trial, which is Court's Exhibit 2, and I will have more to say about that in a moment.

It was agreed by stipulation of counsel that this vessel was 439 feet long and that it had a beam of 63 feet; that is, it was 63 feet wide at its widest part or amidship. That is a pretty large vessel.

You have also heard testimony to the effect that the distance from the top of the rail or bulwark of the main deck to the surface of the ocean on a loaded C-2 type ship—and the main deck was the lowest open deck on the ship—is about 20 to 25 feet.

You have also heard testimony to the effect—which I believe was uncontradicted—that this ship was traveling at the rate of 14½ knots an hour during the night of the

disappearance, or during the time of the disappearance of James W. Miller, and that is between 11.30 p. m. on November 14, 1950, and some time the next morning up to about 10.20 a. m., November 15, 1950.

He was an assistant electrician and his [851] immediate superior was the witness Levy.

On November 15, 1950, while the ship was at sea in the middle of the South Atlantic, on a voyage from New York City to Dakar in French West Africa, James W. Miller was found to be missing. It is this crucial fact which has given rise to this litigation.

Let me tell you right away that the mere fact that James W. Miller disappeared from the S.S. African Glade does not in and of itself provide the plaintiff here with the right to collect money from the defendant. Before the defendant can be called upon to answer for and pay damages on account of the disappearance of James W. Miller, you have to make decisions with respect to certain threshold matters. They are very grave matters because this case presents some extremely delicate questions of fact, and I think that a good way to begin to examine the crucial facts of the case is to look at the complaint, which is the formal writing by which the plaintiff initiates a lawsuit, and in which she makes her claim for damages against the defendant Farrell Lines, Inc.

I won't read all of it because a lot of it [852] has got technical language which I am sure would be tiresome, and I don't think that much of it is important at this point. However, Paragraph 7 of this complaint is of crucial importance, and I think of considerable significance, and it states:

> "That on or about the 14th of November, 1950, while plaintiff's decedent (that means Miller) was lawfully on board said vessel he was caused to be washed overboard solely by reason of defendant's

negligence. The defendant, its agents, servants and employees, officers and crew members were reckless, careless and negligent in failing to maintain a proper and adequate guard and watch over plaintiff's decedent when they knew or should have known of his disturbed condition, in failing to take adequate and necessary steps to have him relieved from his duties, in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all adequate, proper and necessary steps to conduct a search for him after he went overboard, as a result of all of which he was lost at sea and died on the 14th day of November, 1950."

[853] Let us look at the proof in the case. There is no proof that he was washed overboard, so you can forget that. There was no claim that he was not given adequate, prompt and proper medical aid and attention. But there is a claim—and the charge made by the plaintiff in this case is a charge directed very largely against Levy, the chief electrician, because the plaintiff says, in effect, "You, *Farrell Lines*, through the captain, through the officers, but through Levy (and Levy is the responsible pivot upon which they base their claim), you failed to maintain a proper and adequate watch over James W. Miller when you knew or should have known of his disturbed condition."

That is the first charge that the plaintiff has sought to prove in this case.

What does disturbed condition mean? It means that Miller was either insane or on the periphery of being insane; that he was mentally sick. That is what they mean.

They might have said so, but that is another way of saying so. And when they say "You didn't maintain a proper watch over Miller because he was disturbed, and you should have known that he was [854] disturbed," what would be a little more concise and practical way of express-

ing that in this case? Well, it is tantamount to their saying—and that is what the plaintiff in this case is urging you to find—that Miller was so disturbed that he took his own life and that the captain or responsible members of this crew knew or should have known that he was going to commit suicide.

There is no proof of any accident. If there were proof of an accident, it would be the burden of the plaintiff to prove it and there hasn't been one word said about any accident.

If there were an accident, the plaintiff would have to go further and show that the defendant was responsible for the accident, and there hasn't been one word of proof with respect to that.

The whole theory of this case in behalf of the plaintiff is, "Miller was mentally disturbed. Miller took his life because he was mentally disturbed. You should have known of it before he took his life, and because you should have known of it and didn't take adequate and proper steps, you are responsible to us in law and must pay us damages."

You should reflect very, very seriously [855] upon that proposition. Nobody knows how Miller left the ship. Nobody knows when he left the ship. Nobody knows where he left the ship. But the plaintiff's theory of the case is that he left the ship because of a disturbed mental condition which Levy, and through Levy the Farrell Lines, should have known about, and they should have taken adequate steps to prevent it.

If you find that he was mentally disturbed and if you find that he left the ship because of that mental disturbance, it necessarily follows that at the point of leaving the ship Miller probably had no desire or intention to save his own life and didn't jump off with a life preserver or any means with which to preserve his own life. You would be entitled to come to that conclusion.

You would be entitled also to come to the conclusion, on the basis of the evidence which has been argued before you very forcibly by plaintiff's counsel, that there were certain elements indicating or that should have indicated to Levy that this man was disturbed mentally, that Levy should have reported it to the captain, and that the captain should have taken steps to prevent him from doing harm to himself.

[856] Ladies and gentlemen, this is a very grave and a very serious question in this case, and the burden rests squarely upon your shoulders to decide that serious question. We know that at 10.20 the next morning an organized search of the ship failed to reveal the presence of Miller and that the ship was turned around to undertake a search, and it steamed all day until darkness, which I believe was fixed at 5.16 p. m. on the afternoon of the 15th of November, when the unsuccessful search was discontinued.

So that the case can be boiled down to two propositions: That the deceased, James W. Miller, was not properly watched or guarded by the defendant's agents or employees. That means the captain, officers, but particularly Levy, because that is the person upon whom the responsibility is charged in this case, should have known that Miller was in a disturbed condition, that is, mentally sick. And then the other proposition has to do with the fact that after learning of his disappearance the captain, officers and crew failed to take the adequate and necessary steps in the conduct of the search after his disappearance.

Let us deal a little further with that first proposition. It is clear that if Miller had showed any [857] signs of mental instability, then the master, his associate officers including Levy, the chief electrician, were obligated to take proper measures to prevent Miller from doing any harm to himself.

To put it in another way: Ask yourselves whether there was anything relating to the conduct of James W. Miller

prior to his disappearance, and known to Levy, which could have led Levy, and through him the master or the associate officers of the ship, reasonably to believe that Miller might have jumped overboard, because unless there was, you cannot charge the Farrell Lines with the responsibility for Miller's disappearance from that ship.

What does the plaintiff rely on? The unmade bed on the morning of the second day, the smoking when he previously said he had not smoked, the pacing up and down in deep thought, and then the use of that word "moody" by Captain Wilder.

Let me warn you a little bit about the use of the word "moody," because I know that the word "moody" has some connotations when you are talking about people who take their lives.

This page was read to you by Mr. Kaplow, I believe—at least, the pertinent part of it.

[858] Captain Wilder was asked this—I am reading from the bottom of page 30—

> "In your conversations with the chief electrician what did he tell you in the course of his investigation? A. As near as I can remember now, he told me (that is, Levy told me, the captain) that Miller was very quiet and sort of moody but nothing out of the ordinary."

Here is the captain paraphrasing a statement of Levy at the time of his deposition which was taken July, 1955.

Obviously the better evidence is what Levy testified to, because that is the source of Wilder's testimony. Do you believe that Levy told the truth, the whole truth and nothing but the truth?

The plaintiff's entire case rests largely, so far as the first charge of negligence is concerned, the failure to take proper and adequate steps to prevent Miller from doing harm to himself, almost entirely on the testimony of Levy,

and, of course, for that reason he becomes a very important witness.

We do know a little bit about how Miller must have disappeared from the ship because the lowest [859] open deck was the main deck, which I have told you measured from the top of the solid bulwark or fence about 20 to 25 feet from the surface of the sea, and that bulwark or railing was three or four feet high.

If he left the ship from any other point it was probably from a point higher than that, and with the ship going at that speed of 14½ knots an hour you have to decide whether or not Miller was injured when he hit the surface of the water and what his chance of survival was.

You have the testimony of the experts, one of whom, Captain Sheridan, told you that in his experience a man who falls into the sea and is not rescued within a half to a full hour has very small chance of being rescued. The other one, Captain Feinne, said that the man could have been alive at the end of twenty hours.

It is up to you to decide which one told the truth, or apart from which one told you the truth, which one you prefer to accept. You have that stupendous right to choose between the testimony of experts.

We know that Levy went looking for Miller on the morning of the 15th. He went looking for him [860] at 9 o'clock because he wanted his help to do a job, and he made a brief search but, not having found him, he went back to his work and then when Miller didn't appear at the coffee break at 10 o'clock he made a more thorough search and then not having found Miller and having missed him at the mess where the other crewmen gathered, he related the facts to the first assistant engineer and to the master.

Then at that point we have a complete search of the ship by three searching parties. The captain turned the ship around and they steamed all day until darkness fell.

Charge of the Court

I will tell you a little bit more about the adequacy of the search later in the charge, but I think I should dispose of one or two matters dealing with the burden of the plaintiff in this case. The plaintiff has the burden of proving by a fair preponderance of the evidence that James W. Miller disappeared from the S. S. African Glade because of the negligence of the defendant Farrell Lines, Inc., and further that that negligence was the proximate cause of his disappearance.

It is not up to the defendant to explain how and why Miller disappeared. It is up to the plaintiff to [861] prove that his disappearance was chargeable to the defendant, chargeable under these rules of law, and it is only after the plaintiff has sustained that burden that you can approach the question of damages.

You have got to believe that the evidence of the alleged negligence of the defendant outweighs the evidence contrary to that proposition. You have got to believe that the alleged negligence of the defendant is more convincing than the evidence to the effect that there was no negligence, and unless it is more convincing you must find for the defendant.

What do we mean by the preponderance of evidence? In a controverted case you have elements of proof which point one way, elements of proof which point another way. You have bits of evidence, inferences that you can reasonably draw from the evidence, which point to one conclusion or the other and as you build up your case you place the evidence for the plaintiff on one side, for the defendant on the other.

It is like weighing on the two old-fashioned circular plates that were parts of an old-fashioned apothecary scale.

Let us visualize a scale used by the old [862] apothecary or the scales you see in the arm of the symbolic figure of justice with the two chains supporting these two circular

metal plates, and it is just like placing the evidence on each of these two plates, one plate for the plaintiff and the other for the defendant, and then determining whether and how these plates or scales come into some relationship with each other.

If you find that the evidence of the alleged negligence outweighs the evidence contrary to that proposition, then you must find a verdict for the plaintiff.

If on the other hand you find that the evidence to the contrary, that is, that there was no negligence, outweighs the contrary proposition, then you find a verdict for the defendant.

Then there is the third possible alternative. Suppose you find that the evidence brings these two metal plates in perfect alignment and that neither outweighs the other. Suppose your convictions are such that neither plate is tipped, however slightly, more than the other. Then if this is so, the plaintiff has failed to sustain the burden and you must find a verdict for the defendant.

[863] In other words, in order for the plaintiff to succeed, the circular plate on which you have built up the credible evidence in her favor must tip, however slightly, in her favor.

Now, what do we mean by an inference, because in this case particularly, with such a delicate question of fact as that, you have to bring to bear your full powers of judgment, as I know you will.

An inference is defined as a deduction or a conclusion drawn by reason from the premises established by proof, from facts or propositions known to be true.

Let me give you an example: Suppose you are seated at home reading a book and it is nighttime and you have the blinds drawn and some member of the family comes in with a wet umbrella, wearing galoshes and a raincoat, and removes those articles. It would be a reasonable inference that it has been raining.

Suppose, to give you an example a little bit closer to the sea, the captain of a freight vessel asks a sailor to go to the bow because there is something at the bow that needs to be fastened or chained properly, and let us suppose there is a very, very rough sea running, with waves crashing [864] over the bow, and he says to him, "Now, I want you to be careful. I am going to rig up a line and I want you to wear a harness so that when you go out there you will have the freedom of your both arms, and you will be kept on the ship without fear of being washed overboard."

And then let us assume they put the harness on this man, and let us assume that they have often used this type of harness before and they have often used this type of line before in a similar type of storm in comparable weather.

Then let us assume that the sailor goes out to the bow and that while he is doing the task assigned to him a large wave crashes over the bow, and after the water has subsided and the bow comes up again within full visibility the sailor is not there and the line is broken.

What is the reasonable inference? The reasonable inference is that he was washed overboard. That is the only reasonable inference you could draw from those circumstances.

There are thousands and thousands of others which I could cite as examples, but I am sure that in your daily lives you are constantly resorting to [865] the same type of judgment and appraisal in making important decisions, and it is your judgment which you must bring to bear.

Now, proximate cause. I have told you that not only does the plaintiff have the burden of proving by a fair preponderance of the evidence the negligence of the defendant, but she must go further and show that that negligence was the proximate cause of, in this case, the disappearance of James W. Miller.

Charge of the Court

Proximate cause means a cause, or element of causation, the reasonable and natural consequence of which would lead to the disappearance, and defendant's negligence must be a link in an unbroken chain of reasonably foreseeable events.

You must determine whether there was a direct causal relationship between the act of the defendant—in this case the charge that the defendant failed to conduct an adequate and proper search, and the other charge, that the defendant failed to guard and protect Miller when there were reasonable signs of his mental disturbance—you have got to find that between either one or both of those acts of negligence there was a causal relationship between that and the disappearance, and that except for that [866] causal connection the disappearance would not have occurred.

The question of proximate cause is extremely important in this case. If you believe that Miller committed suicide, that he jumped off this ship of his own volition because he was mentally disturbed and that there was no reason for anyone to suspect that he was going to commit suicide, then clearly the defendant cannot be held liable. The Farrell Lines cannot be held liable unless you find that there was reasonable cause to believe that he was mentally disturbed, and unless, further, they took such steps as you believe were reasonable under the circumstances to protect him from any harm.

It is up to you to determine whether the plaintiff has sustained her burden of showing that Miller manifested signs of mental instability which could reasonably have led the defendant, through Levy, the electrician—because that is the pivot upon which they relied—to believe that there was danger that Miller would do harm to himself or take his life.

I have already told you what we mean by negligence and I believe you understand that sufficiently.

Charge of the Court

What do we do with witnesses, because in the [867] case much of what Levy says is not contradicted, but the plaintiff takes the position that he has not been frank with you, that he has not told you all the truth, that you should draw certain inferences from things that he said.

Well, now, be very careful, be very careful. You cannot make proof in a case that does not exist. You can destroy a witness' credibility. You have a perfect right, if you want, to come to the conclusion either that Levy told the truth, the whole truth and nothing but the truth; that he told part truth and part falsehood; that he may have been accurate in some respects or inaccurate in other respects; or perhaps that he wilfully perjured himself.

If you believe that he told a wilful misstatement at any point then the law gives you the right to reject that part of his testimony which you believe to be tainted by the wilful falsehood and accept only that which you believe to be true, or you can reject all of it, pretty much like a man eating an apple finds that it has an imperfection; some men will eat the good part around it and throw away the bad; others will throw away the whole fruit. That is what you do with testimony which you believe [868] may be affected by a wilful falsehood, and that applies not only to Levy but to every witness in the case if you think any witness was guilty of a wilful falsehood.

Remember, however, that Levy as well as Aiken, the chief steward, as well as Captain Wilder, as well as Crowell, the first assistant engineer, all gave these statements under oath on November 21, 1950, long before there was a lawsuit, long before there were lawyers in the case, to the American Consul at Dakar, West Africa.

You would do well to consider these statements very carefully.

One of the tests which you apply in determining the weight and credibility you want to give to any particular witness is the inherent probability of the witness' story.

Did it have the ring of truth? Did it appeal to you as being reasonable, credible, believable? Or did it have an element of disharmony or falsehood? Did it lack the reasonableness which you feel should be attributed to a true story?

Mrs. Miller was a witness. She appeared before you. She has been under attack here on the basis that her relationship to her husband may not [869] have been a relationship normally existing between husband and wife.

It is an admitted fact that between Christmas Eve 1947 and April 1950 she saw her husband only once, despite the fact that she had a small child and despite the fact that it is uncontroverted that he had leaves sufficient to have permitted him to make the trip to the place where she lived.

She explains that by saying that he was anxious to accumulate service on ships so that he could obtain his citizenship as quickly as possible. But that does not explain why he chose not to go home during his leave periods. He was free during those leave periods. He was just as free to go home as he was to stay away from home, and there is a very compelling inference in this case that he chose not to go home.

You have to decide as to why he did not go home between April 1950 and the date of his disappearance. Between December 1947 and November 1950, although he had a number of leaves, according to Mrs. Miller's testimony he went home once. That was in April 1950. Ask yourselves why. Ask yourselves whether Mrs. Miller gave you the whole explanation. Did she tell you the truth, the whole [870] truth and nothing but the truth?

She is an interested witness. That does not mean that her interest in this case, her obvious financial interest in this case, disqualifies her as a witness. It just means that it is one of the elements that you can consider.

Every witness, either by virtue of relationship to a litigant in the case, through employment, financial interest, relationship to another witness, all of those elements can be considered by you as bearing upon his credibility.

Suppose a witness makes a contradictory statement. You can consider that, too. The appearance of a witness on the stand—that is why this chair is where it is, so that you can see the witness. You can consider that.

And then remember that it is the quality of the evidence, not the quantity, that counts.

And in weighing the evidence, in giving it that weight, putting it on that plate and attributing to it the weight that you believe it should have, you should emphasize its quality rather than its quantity.

What do we mean by the weight of evidence? [871] I want to give you a very homely example. I was once in a dining car on a train and I was eating at the same table with two ladies and a little boy and one of the ladies was the mother of the boy, and she had decided that he should eat spinach and a lamb chop.

The little boy was very displeased about that and he ate his lamb chop and when he got to his spinach he pushed his plate away, and the mother said to the other lady, who apparently was related to her, "You know, Johnny just loves spinach," and the lady smiled.

Well, now, I couldn't help smiling, but what did I do and what did that lady do when she was smiling? She was weighing the evidence. Obviously Johnny didn't love spinach. She said he loved spinach, but he didn't. His gesture contradicted the words of the mother, but the words of the mother, the smile of the lady and the gesture of the boy taken together added up to what? Added up to little Johnny not liking spinach.

That is what you do when you weigh evidence. You have to project yourselves against all of the background, all of the circumstances surrounding a particular incident,

and ask yourselves what would a reasonable man have concluded? Put yourself in [872] the position of Levy and try to follow the contacts that Levy testified to with Miller during the four days he was his immediate superior on this boat, and ask yourselves what would a reasonable person have done under these circumstances?

Was there any reasonable basis to believe that he was mentally disturbed and that something should have been done about it?

As to the expert witnesses, I have already told you. We heard Captain Feinne, Captain Sheridan and Mr. Umstead, all men of very vast experience in handling vessels and going to sea. They have testified at great length. They have been examined with great thoroughness and great skill. And then to some extent Captain Wilder and Captain Ware, as well, although they were witnesses to the events, much of what they testified to was in the expert field.

You have to decide for yourselves whether the search was adequate and proper once the alarm was given.

Let us get to the adequacy of the search, because that is the second basis upon which the plaintiff claims that she is entitled to collect from the Farrell Lines in damages, and here again I don't [873] want to repeat it, but it is so important: She has the burden of proving by a fair preponderance of the evidence that the defendant failed to take all of the adequate, proper and necessary steps to search for Miller after his disappearance. She also has the burden of proving by a fair preponderance of the evidence that because of the inadequacy or impropriety of that search Miller died.

The normal rule is that proper and efficient means should be taken to effect a rescue of a seaman who has fallen overboard. It is pretty clear from this case that no one on the vessel knew that Miller had left the ship until the morning of November 10th, and only after the

vessel had been carefully searched—I believe that was at 10.20—when the ship was turned around, put on a reverse course, was a sea search undertaken.

A great deal of time has been spent in this case on the question of whether or not the ship was properly handled from this time forward. Here again there is a very serious question of causal relationship between the alleged failure on the part of the master and crew to conduct a proper and adequate search and the disappearance or death of Miller.

[874] You have to decide which of the expert testimony you wish to believe as to whether or not a proper and adequate search was conducted. But you also have to be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence that this search, even assuming that it was inadequate, was the proximate cause in whole or in part of the death at sea of James W. Miller.

In other words, ladies and gentlemen, if you believe—and you are entitled to believe it from the evidence in this case—that Miller committed suicide by jumping from the railing of the main deck during the night of November 14th to 15th, and that he was already dead at the time the ship was turned around, then the plaintiff cannot prove that part of the case, because if he was already dead at the time the defendant undertook its sea search, it didn't make any difference what kind of a search they conducted. Since he was already dead, their search could not have saved him. The search would have been subsequent to the death and could not have been the cause of the death.

So that if you believe that Miller was dead [875] at that time, when they turned the ship around and started the search, it makes no difference how they conducted the search, because they couldn't have saved Miller in any event. It has to be the proximate cause of the disappearance or death. It is not the proximate cause of the disap-

pearance or death if Miller was already dead because the search was subsequent to it.

I hope I have made that clear because it is an extremely important consideration in this case. In other words, to put it differently, you have got to be satisfied that Miller was alive at the time the defendant's responsibile employees knew of the disappearance and undertook the search; that the search was inadequate and improper and that there was a direct causal relationship between the inadequate search and the disappearance or death of Miller.

Let me come to the question of damages, and here again I want to emphasize the fact that the law gives you no right to award damages unless you are satisfied of all of the other elements in the case about which I have charged you.

You have to pass the question of the burden of proof, the weight and credibility of the evidence, [876] the preponderance of the evidence, the existence of the negligence, the causal, direct causal relationship between negligence and the disappearance or death of Miller, and until you have passed all of that in favor of the plaintiff you cannot come to the question of damages.

If you have not satisfied yourselves with respect to all of the matters about which I have charged you up to this point in favor of the plaintiff, then your verdict must be for the defendant. But assuming that you have passed those and have made all of your findings in favor of the plaintiff, and you feel that the plaintiff has sustained her burden by proving by a fair preponderance of the evidence that the defendant's negligence, either the search or the failure to take care of Miller, was the proximate cause in whole or in part for his disappearance or death, then and only then you consider the question of damages.

They are broken down into two principal elements. One is the personal suffering of the deceased between the

time his body struck the water and the time he died, and I realize you have to do the best you can on the basis of an almost complete [877] lack of evidence. The theory of the case has been tried, as I say, on the basis of mental instability and the inferences are very strong that Miller jumped off this ship of his own volition because he wanted to do away with himself. But we don't know where, how or when this disappearance occurred. We don't know how he died or when he died.

You will have to do the best you can under all of the evidence in the case. And may I stress this, that it is the suffering of Miller. The law does not provide the beneficiaries for any compensation for pain and suffering to them because of their bereavement, because of their grief, because of their loss of companionship or society or their mental anguish, however much these matters may appeal to our sensibilities.

You cannot give any award on that basis. It is only the personal suffering, the pain and suffering of the decedent between the time he struck the water and the time he died for which you can award a verdict and express it in dollars and cents.

And then the other element of the damages consists of the pecuniary loss to his beneficiaries, the pecuniary loss to his widow, the pecuniary loss [878] to his child, as a result of his death.

You take into account Miller's age. As I recall, he was 36 years of age. You take into account his condition, his probable span of employment in the light of his age and physical condition had the disappearance not occurred; the probabilities of his being able to continue his work beyond the date of the accident; the probable continuance of his contributions to his wife or his child, or both of them.

You can consider whether he would have lived the span given by the statistical tables of 31 years. You can consider that he would have lived 31, 21, 11 or even 41

years It is entirely up to you. You are not bound by those tables; they are merely a guide.

And you can consider whether he would have improved his earning capacity, whether it might have been cut short or impaired. And then you must decide on the basis of his past conduct towards his family, in the light of his propensity to be generous to his wife and child, or his failure to be generous about what do you think he would have continued to give them and what do you think was the pecuniary loss that they sustained.

His salary for about two years prior to the [879] disappearance, as I recall the testimony, was just below and above $300. Let us say approximately $300. He gave regular allotments, according to the slips that Mrs. Miller had, of $120 a month, plus $100 a year for extras, which meant that he gave her on the basis of that salary of about $300 a month $120 a month, or roughly something just short of $1500 a year. This was a little more than a third of his total salary.

It has been argued to you that he was not on good terms with his wife, that she worked, and that this amount was not really a contribution for her but for the child.

It is up to you to decide what you think it was under all the circumstances of the case, and then it is up to you to decide what you think the pecuniary loss was, first to the widow and secondly to the child, if and when you get to the question of damages.

An amount of money given now representing an amount of money which normally would be paid in the future is entitled to be deducted by what we call a commuted amount, and those of you who are accountants and have facility with figures will understand what I mean.

[880] A rough rule of thumb for obtaining present cash value is to discount the estimated financial loss by a percentage equal to the number of years it is assumed that the pecuniary benefits will continue to be received. For instance, suppose somebody owes you $1,000 a year for

the next ten years. That means you are going to get $10,000 over a period of ten years. But suppose he comes to you and says, "I want to pay you now, but in order to pay you now I think you should give me a discount."

Well, now, it is a normal transaction in business to give a discount where you anticipate a payment over a period of years, and the rough rule of thumb would be that you deduct 1 per cent for each one of those years. So that a prepayment of $9,000 would roughly be the fair liquidation for that $10,000 amount payable over a period of ten years, and you can, if you consider life expectancy, either improvement or impairment, come to some amount. If and when you come to the question of damages, it would be proper and reasonable for you to commute that value in the light of the prepayment.

Please deliberate with a disposition to listen to your fellow jurors and listen to their points [881] of view, and please be anxious and willing to express and to explain your own points of view.

In that way you are performing one of the highest and most important duties of citizenship.

Regard your foreman as you would a chairman of a committee, and when your foreman can report that you have agreed upon a verdict—your verdict must be unanimous—the marshal will report back to me and we will convoke the Court to hear your verdict.

If in the meantime you wish to refresh your recollection about any of the evidence, or you wish to receive any of the exhibits, if your foreman will send me a note I will see that you are accommodated.

If there is any part of the charge which you wish to have elaborated or explained, I will be glad to do anything you wish in that respect.

Because of the extreme importance of the questions of fact in this case, I have prepared two questions which I

want you to answer, and I am going to hand this paper to the foreman.

Mark this Court's Exhibit 3, please.

(Marked Court's Exhibit 3.)

The Court: Now, Court's Exhibit 3 consists of two questions and a form of verdict.

[882] The first question is this:

> "Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

You will please answer that question yes or no.

The second question, which is in two parts, and which you should also answer yes or no, is as follows:

> "Upon being notified that Miller had disappeared from the S. S. African Glade at 10.20 A. M. on November 15, 1950:
>
> "(a) Was James W. Miller alive at that time?
>
> "(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?
>
> "Third: In addition to answering the above questions, please report your verdict as follows:
>
> "For defendant or For plaintiff,"

and then in the event the verdict is for the plaintiff there are three subdivisions and your verdict may be [883] divided into any one or all of those three subdivisions as you see fit:

Charge of the Court

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller.

"(b) Amount, if any, awarded for the pecuniary loss to the widow.

"(c) Amount, if any, awarded for the pecuniary loss to the child."

I hand this to the foreman of the jury and the marshals may now be sworn and the jury retire.

I just would like a moment to confer with counsel. There may be suggestions or exceptions. I promise this won't take more than a few minutes, ladies and gentlemen.

* * *

[884] The Court: The jury may retire.

(Jury retired at 1.05 p. m.)

* * *

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IN THE

Supreme Court of the United States

October Term, 1957

No. 607

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mildred L. Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York directing a verdict for the respondent after a jury verdict was returned in favor of petitioner.

Opinions Below

The opinion of the Court of Appeals has been officially reported. 247 F. 2d 503. The District Court did not render an opinion. The opinion of the Court of Appeals is set forth in Appendix A, infra, pp. 15-23.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit was decided and entered on August 16, 1957.

The jurisdiction of this Court to review this decision and judgment is predicated upon Title 28 United States Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether the Court of Appeals, in affirming the judgment of the Trial Court which set aside the jury verdict in favor of petitioner in this *Jones Act* case and granted judgment to respondent, erroneously deviated from the principles of law established by this Court in the case of *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500.

2. Whether the Court of Appeals, in affirming the judgment of the Trial Court in this *Jones Act* case, erroneously deviated from the principles of law, concerning the scope of the jury's function, established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645.

3. Whether petitioner was deprived of her constitutional right of trial by jury when the Court of Appeals indulged in a re-evaluation of the facts to reach conclusions different from those of the jury.

Statutes Invoked

The pertinent statutes are set forth in App. B, infra, pp. 24-27.

Statement of the Case

This suit at law predicated upon the provisions of the Jones Act, 46 U. S. C. Section 688, was an action to recover pecuniary damages for the wrongful death of petitioner's decedent who was lost at sea through the negligence of respondent.

The complaint alleged two alternative counts of negligence. The first count alleged negligent failure to provide adequate, prompt and proper medical care and attention. The second count alleged negligent failure to take proper and efficient means to effect a rescue of petitioner's decedent. The case was tried on these alternative theories.

Trial was held before the Honorable Edmund L. Palmieri and a jury in the United States District Court for the Southern District of New York on October 18, 19, 20, 21, 24 and 25, 1955.

The Court submitted the case to the jury with directions to bring in answers to special interrogatories together with a general verdict.

After deliberating approximately eight hours, the jury returned with a general verdict in favor of petitioner in the sum of $55,000 and simultaneously, the jury returned with answers to all the special interrogatories which were consistent with their general verdict (App. A, infra, pp. 23-24).

The Court then, within minutes after the jury verdict, upon motion of defendant-respondent, set aside this jury verdict and directed a verdict for defendant-respondent.

James W. Miller (petitioner's decedent) signed shipping articles on the S.S. "African Glade" on November 10, 1950 as assistant electrician (R. 88).* He disappeared

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* R. refers to pages of Transcript of Record.

at sea during a voyage on the night of November 14-15, 1950 (R. 102). He was given up as lost at sea on November 15, 1950 (R. 102).

The S.S. "African Glade" set sail, with a full crew and eleven passengers, from New York in the evening of November 10, 1950 on her course for Dakar, West Africa, her first port of call (R. 77). The voyage was on a trade route of the Atlantic Ocean regularly used as a shipping lane or highway for United States to West Africa commerce (R. 354).

With respect to the first count of negligence (commonly called "neglect to treat") Chief Electrician Levy, decedent's superior (R. 153) and roommate (R. 154), testified that Miller had not slept in his bed for two consecutive nights (the nights of November 13-14 and November 14-15 (R. 199); that Miller was quiet (R. 230); that Miller shared a bottle of rum with another seaman on the night of November 12 (R. 193); that Miller asked Levy for a cigarette although Miller had originally told Levy that he had given up smoking (R. 231).

The jury, by their negative answer to Interrogatory First, decided this issue of fact of "neglect to treat" against the plaintiff on the first count of negligence. A reasonable inference from this jury answer is that decedent was not mentally disturbed when he fell into the sea.

With respect to the second count of negligence (commonly called "failure to rescue"), the petitioner called as witnesses (in addition to Chief Electrician Levy), Captain Wilder (Master of the S.S. "African Glade") (R. 76) and Captain Feinne, a Master-Mariner and maritime expert (R. 323). Captain Wilder's testimony was presented by his deposition (Court Ex. 1—R. 163) originally taken by the defendant.

Captain Wilder testified that he was informed at 10:20 A. M. on November 15 of the fact that Miller was appar-

ently not on board the ship (R. 79); that he caused searching parties to be sent to various parts of the ship (R. 79); that simultaneously he turned the ship about on a reverse course as he believed Miller had fallen over the side (R. 79); that he interrogated only Chief Electrician Levy (R. 113), Chief Steward Aiken (R. 114) and First Assistant Engineer Crowell (R. 115); that he learned from Aiken that Aiken last saw Miller alive at 11:30 P. M. on November 14; that he assumed from Levy's information that Miller disappeared prior to 6 A. M. on November 15 (R. 102); that he did not interview the entire crew (R. 115) nor any of the passengers concerning Miller's disappearance; that he radioed only once to a U. S. Coast Guard Weather Ship (R. 79) and had no further communication with the U. S. Coast Guard; that he did not communicate with any other ships in the ocean track though it was a known trade route; that he did not require the navigating officer, Second Mate Ware, to obtain any "fix" of "position" at any time during the day of November 15; that he called off the search at 5:16 P. M. on November 15 when darkness set in; that he did not use the searchlight of the ship though it was available; that the vessel traveled approximately 165 miles between 11:30 P. M. November 14 and 10:30 A. M. November 15 (R. 99); that the vessel traveled approximately 95 miles between 10:30 A. M. November 15 and 5:16 P. M. November 15 (R. 99); that the air temperature varied from 77° at noon of November 14 to 76° at noon of November 15 and at midnight of November 14-15 it was 74° (R. 111).

Captain Feinne, plaintiff's maritime expert, testified that, according to the known positions of the ship as given in the ship's log, the Master (Captain Wilder) *had not* reversed course on a *reciprocal* course but *had* reversed course on a *parallel* course and was twelve to thirteen miles south of a reciprocal course (Ptf. Ex. 34—R. 343) (R. 461); that the Master had not returned on his own track (R. 346) (R. 397); that a competent master would return to a posi-

tion where Miller was last known to be alive (R. 349); that upon reaching that position a competent master would perform a search pattern with the ship (R. 359); that a competent master would radio other ships on this trade route or ocean "highway" (R. 354); that a competent master would be in frequent communication with the U. S. Coast Guard; that a competent master would have the navigating officer check the ship's position during the search and try to establish by celestial navigation where the ship was (R. 344); that a competent master would interrogate all crew members (R. 359) and passengers to learn as much as possible about the disappearance; that a fall from the after-end of the vessel could or could not cause injury (R. 472); that a person falling from the after-end of the vessel would not be caught up in the propeller (R. 488).

Captain Feinne testified that in his expert opinion Captain Wilder did not make a competent and efficient search (R. 376, 779).

Respondent called two Master-Mariners as experts who testified that Captain Wilder had performed an efficient rescue search.

The Court with painstaking detail set forth the jury's duty to decide between the maritime experts on the issue of adequate search and to determine whether (assuming the jury found the search was inadequate) this inadequate search was the proximate cause, at least in part, of Miller's death (R. 872-875).

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals in this Jones Act case is in direct conflict with the decisions of this Court in *Rogers* v. *Missouri Pacific R. R. Co.* and subsequent cases.

This Court clearly enunciated the extent of judicial function in relation to jury questions in F. E. L. A. (45 U. S. C. § 51 *et seq.*) and Jones Act (46 U. S. C. 688) cases in the following language in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part* at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* [to its] negligence.' (Emphasis added.)"

As recently as October 21, 1957 this Court made the following order Per Curiam in *Gibson* v. *Thompson* (reported unofficially in 26 U. S. Law Week 3128):

> "142 Gibson v. Thompson, Per Curiam:
>
> The petition for certiorari is granted, and the judgment of the Supreme Court of Texas is reversed

and the case is remanded. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500; Webb v. Illinois Central R. Co., 352 U. S. 512; Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521; Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920; Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920; Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925; Thomson v. Texas & Pacific R. Co., 353 U. S. 926; Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360; Ringhiser v. Chesapeake & O. R. Co., 354 U. S. 901; McBride v. Toledo Terminal R. Co., 354 U. S. 517. For the reasons set forth in his opinion in Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 524, Mr. Justice Frankfurter is of the view that the writ of certiorari is improvidently granted."

It is clear therefore that in these Federal Employers Liability Act and Jones Act cases which are significantly different from ordinary common-law negligence actions this Court has endeavored explicitly to set forth the jury functions and the functions of the Judge and the tests to be applied in order to effectuate the intent of Congress. In the instant case the opinion of the Court of Appeals for the Second Circuit is a good illustration of how "erosion" of the F. E. L. A. and Jones Act results from narrow construction.

The jury in this case found conclusively that the Master of the vessel performed an inefficient and negligent rescue and that this negligence played a part in the death of petitioner's decedent. We know this not only from the general verdict of the jury but also from the jury's answers to the Special Interrogatories [App. A] submitted to them by the Trial Court pursuant to Rule 49 Federal Rules of Civil Procedure.

Neither the Trial Court nor the Court of Appeals was satisfied to permit the jury's findings to stand. The Trial Court wrote no opinion but merely granted respondent's

motion for directed verdict, made pursuant to Rule 50, and set aside the verdict for petitioner and granted judgment n. o. v. to the respondent. The Court of Appeals finds that the Master of the vessel performed an efficient rescue. By so doing the Court of Appeals acts in conflict with the principles and concepts of the *Rogers* case. This misconception of the Court of Appeals is not cured by the mere fact that that Court pays lip service to the *Rogers* case by citing it.

This Court should continue to exercise its power to review in this case in which the Court of Appeals has improperly deprived this petitioner of her right to a jury determination and in which the Court of Appeals has attempted to whittle away the remedy enacted by Congress.

II

The Court of Appeals has failed to recognize that the jury in a Jones Act case is permitted to engage in a measure of speculation in accordance with the principles of law set forth by this Court in *Lavender* v. *Kurn*.

It was the function of the jurors to decide whether there was an efficient rescue attempt. From the evidence adduced, they were justified in finding *as they did* that Miller was alive at the start of the search and that a Master who was 12 to 13 miles south of the correct reverse course and who only communicated with the U. S. Coast Guard weather ship once during the entire search and who did not attempt to communicate by radio with any other ships in this well-traveled trade route and who did not ascertain accurately the course he had been on nor the reverse course he was following, certainly *contributed at least in part* to Miller's death.

It is no answer (to the problem of whether it is properly a jury function to determine this issue of fact), to say that the exercise of the jury function involves a measure of speculation and conjecture. In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court, in discussing this very question said at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949), a verdict for plaintiff was affirmed and among other things Judge Swan said at page 327:

> "It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * *But almost every verdict of a jury involves the element of speculation or conjecture to some extent.*"

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944) at page 35, the Court stated:

"* * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

In the instant case there certainly existed a conflict in the testimony between the experts as to whether the vessel's Master performed the attempted rescue in a competent manner; as to how long a person could be expected to survive in the particular area of the Atlantic Ocean affected as it was by the Gulf Stream; as to whether petitioner's decedent was injured upon leaving the vessel and entering the water and as to whether the vessel was on a proper course during the search. There were also conflicting conclusions which could have been drawn by the jury from the testimony of Chief Electrician Levy and Chief Steward Aiken with respect to whether petitioner's decedent was mentally disturbed during the five days of the vessel's voyage by reason of the fact that Miller did not sleep in his bed for two consecutive nights and renewed the smoking habit and drank some rum on one night. The jury in answering Interrogatory First in the negative resolved this conflict concerning Miller's mental condition and it is reasonable to infer from this jury answer that Miller was not mentally disturbed when he fell into the sea. In their answers to Interrogatory Second the jury resolved the con-

flict of testimony between the experts and the jury concluded that the negligence of the defendant caused, at least in part, the death of plaintiff's decedent. While the Trial Court and the Court of Appeals may have reached conclusions opposite to that of the jury and may have differed with the ultimate findings of fact of the jury, error was committed when a directed verdict for the respondent was granted.

III

The departure by the Court of Appeals from the constitutional protection afforded the petitioner and others similarly situated warrants the exercise of this Court's power of supervision.

As stated by this Court in *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523 (1956) "the jury trial 'is part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' which the Jones Act makes applicable to those working as petitioner's husband was here. (Footnoting Bailey v. Central Vermont R. Co., 319 U. S. 350, 354.) The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' (Footnoting Galloway v. United States, 319 U. S. 372, and cases there cited."

While the majority of this Court in the *Schulz* case did not explicitly overrule the majority opinion in the *Galloway* case (a non-F. E. L. A. case) yet the only reasonable conclusion is that the concepts expressed in the dissenting opinion in the *Galloway* case, written by Mr. Justice Black and concurred in by Mr. Justice Douglas and Mr. Justice Murphy, are now the concepts which prevail in this Court.

Mr. Justice Black pointed out in his detailed dissent in the *Galloway* case that the Supreme Court must be ever

vigilant that the lower courts not be permitted to constrict the fundamental right of trial by jury through narrow construction which can only have the effect of depriving litigants of their Constitutional rights and statutory remedies.

Indeed, the Chief Judge of the Court of Appeals for the Second Circuit has recognized that this danger of judicial constriction is present in that court.

In *Kermarec* v. *Compagnie Generale Transatlantique*, 245 F. 2d 175, Chief Judge Clark in his dissent said:

> "* * * another instance of judicial meddling with jury verdicts with which the judges disagree."

(Petition for writ of certiorari was filed in the *Kermarec* case on Sept. 20, 1957.)

Likewise in *Palermo* v. *Luckenbach Steamship Company*, 246 F. 2d 557, Chief Judge Clark in his dissent found and deplored

> "a growing tendency in this Court to upset awards in jury cases."

(Petition for writ of certiorari and summary reversal was granted Oct. 21, 1957.)

The misconception by the Court of Appeals for the Second Circuit as to the full meaning of the right of trial by jury has resulted in a direct conflict between that circuit and the Court of Appeals for the Seventh Circuit in decision of the Seventh Circuit in the case of *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, 246 F. 2d 834 (rehearing denied Aug. 30, 1957).

In *Gibson* v. *Elgin, J. & E. R. Co.*, the jury in an F. E. L. A. case involving some measure of speculation had returned a verdict for the plaintiff. The Trial Court set aside this jury verdict and granted judgment n. o. v. to defendant. The Court of Appeals reversed the Trial Court upon the authority of the *Rogers* case and the *Lavender* case.

The case at bar belongs to that important class of cases requiring respect for the proper jury function referred to in the concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, 336 U. S. 53.

CONCLUSION

For all of the reasons outlined the petitioner prays that this Court grant the writ of certiorari and petitioner further prays that this Court grant summary reversal because, it is submitted, the decision of the Court of Appeals, which affects this important class of cases, is so clearly erroneous as to make argument before this Court a waste of time.

Respectfully submitted,

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Attorney for Petitioner.

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit

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No. 367—October Term, 1956.

(Argued June 5-6, 1957 Decided August 16, 1957.)

Docket No. 24066

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant,

—v.—

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

In an action brought under the Jones Act, 46 U. S. C. A. § 688, to recover for the death of the plaintiff's husband, who disappeared from defendant's vessel, S. S. African Glade, in the middle of the Atlantic Ocean, plaintiff appeals from an order of Edmund L. Palmieri, *Judge,* Southern District of New York, setting aside a jury verdict of $55,000 for the plaintiff and entering judgment for the defendant.

HERBERT J. KAPLOW, New York, N. Y., for plaintiff-appellant.

STAPLETON, FLYNN & LILLY, New York, N. Y., for defendant-appellee. DANIEL FLYNN and GEORGE M. SULLIVAN, of Counsel.

LUMBARD, *Circuit Judge*:

This is an action brought under the Jones Act, 46 U. S. C. A. § 688, to recover for the alleged wrongful death of James W. Miller, the plaintiff's husband. The complaint alleged that Miller was caused to be "washed overboard" because defendant was "negligent in failing to maintain a proper and adequate guard and watch over" Miller "when they knew or should have known of his disturbed condition; in failing to take adequate and necessary steps to have him relieved from his duties; in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all the adequate, proper and necessary steps to conduct a search for him after he went overboard. As a result of all of which he was lost at sea and died on the 14th day of November, 1950." The defendant moved for a directed verdict both at the end of plaintiff's case and after the entire case. Judge Palmieri reserved decision in both instances and submitted the case to the jury. After the jury returned a verdict of $55,000. for the plaintiff, Judge Palmieri granted the defendant's motion to set aside the verdict and directed judgment for the defendant. From this decision the plaintiff appeals.

On November 10, 1950, a week following graduation from the United States Maritime Service School as a qualified assistant electrician, Miller signed articles on the S. S. African Glade, a C-2 type freighter, owned and operated by the Farrell Lines, for his first and last voyage as an assistant electrician. The ship sailed the evening of the same day for Dakar, West Africa. Miller shared a cabin in the forecastle with Chief Electrician Levy, his immediate superior. He had not previously shipped aboard this ves-

sel and apparently knew no other members of her crew. Miller had been at sea for 22 years as he went to sea at the age of 14, and during his service in the British Merchant Marine he attained the rank of Master of British Ships.

About 6:00 P. M. on November 14 the Chief Electrician returned to his quarters and found Miller there reading, and about 6:30 P. M. Levy left him alone in the cabin. Around 11:30 P. M. Chief Steward Leopold Aiken saw Miller pacing the afterdeck and noticed nothing unusual about him except that he appeared deep in thought. This was the last time Miller was seen aboard the vessel. As may be expected in such a case there is no evidence as to the time, manner or place of his departure from the ship. The case was tried on the theory that Miller jumped overboard intending to commit suicide.

The next morning, November 15, Chief Electrician Levy got up about 7:30 A. M. He noticed that Miller's bunk had not been occupied that night but did not think it strange since Miller had not occupied his bunk the night before. When Miller did not show up at the 10:00 A. M. coffee break, Levy, after inquiring of his whereabouts from other members of the crew, reported him missing to the master, Captain Wilder.

Captain Wilder thereupon called all department heads and had a search of the vessel made for the decedent. Miller was not found and at 10:20 A. M. the African Glade turned back 180 degrees into her own wake on the course which it had just sailed.

Captain Feinne, plaintiff's maritime expert, testified that from his examination of the log book of the African Glade he concluded that the course she took after making this turn was not reciprocal, but was a parallel course, twelve or thirteen miles south of a reciprocal course. Captain Wilder, though admitting he did not have a navigational fix taken, testified that he turned the bow of the African Glade back into her own wake thus pursuing the reciprocal course.

During the search Captain Wilder sent a radio telephone message concerning the disappearance to his home office and one to the U. S. Coast Guard Weather Ship. Captain Wilder did not radio any of the other ships in the vicinity, admittedly the correct procedure, for the Coast Guard was in touch with all such ships.

When darkness fell at 5:16 P. M. the search was called off; the African Glade was then approximately 70 miles from the place where she had been when Miller had last been seen alive at 11:30 P. M. the night before. The ship then headed again toward Dakar.

In reserving his decision on the defendant's motion for a directed verdict, Judge Palmieri made it quite clear that it was his opinion that there was a complete lack of proof on the question of causation, but he let the case go to the jury to avoid the trouble and expense of a new trial should he later be held in error. In his charge to the jury, Judge Palmieri defined negligence and proximate cause and the jury was instructed that they could not find for the plaintiff for failure to make proper rescue efforts unless they first concluded that Miller was alive at 10:20 A. M. on the morning of November 15, 1950.

With the consent of counsel (subject of course to the defendant's motions for a directed verdict) Judge Palmieri then submitted special interrogatories to the jury which returned the answers as noted:

> First: Did Miller's conduct aboard the S. S. Africaan Glade between November 10, 1950 and November 14, 1950, manifest signs of instability which could reasonably have led the Master ~~or his~~ associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?
>
> The answer is no.
>
> Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,

(a) Was James W. Miller alive at that time?
The answer is yes.

(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?
The answer is no.

Third: In addition to answering the above questions, please report your verdict as follows:
For the defendant—No.
Plaintiff—Yes.

(a) Amount, if any, awarded for the pain and suffering of James W. Miller. None.

(b) Amount, if any, awarded for the pecuniary loss to the widow. $10,000.

(c) Amount, if any, awarded for the pecuniary loss to the child. $45,000.

Immediately after the verdict, Judge Palmieri granted the defendant's motion for a directed verdict on the ground that there was no proper basis for the establishment of any causal relationship between the alleged negligent search and Miller's death. We agree.

In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought . *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957); *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521 (1957). The burden of showing this causation rests on the plaintiff. *Johnson* v. *N. Y. N. H. & H. R. Co.*, 194 F. 2d 194 (2 Cir. 1952), rev'd on other grounds, 344 U. S. 48; *Pittsburg S. S. Co.* v. *Palo*, 64 F. 2d 198 (6 Cir. 1933). In this case the plaintiff did not introduce evidence of any probative facts to show that the defendant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations.

The jury's first speculation was whether Miller left the ship and struck the water, 20 to 25 feet below the deck on which he was last seen, in such a way as to avoid the action of the propeller. There was evidence that a man jumping from the side of a vessel, aft of midships, would be caught in the suction created by the forward motion of the ship, drawn into the screw and mangled. Secondly, the jury would have to suppose that Miller had hit the water in such a way as to remain afloat. Even though the air and water temperatures were between 72 and 74 degrees during the pertinent period of time, there was no evidence that Miller took with him any means of staying afloat, such as a life preserver. On the contrary, the plaintiff's case was tried on the theory that Miller was unstable and meant to commit suicide. The fact that a man jumps overboard into the sea to commit suicide is hardly a factual basis for speculating on the ways and means of his staying alive and afloat under circumstances of the greatest difficulty even for a much younger expert swimmer fighting desperately for his life. Indeed the record is barren of evidence as to whether Miller could swim.

Thus a further speculation is necessary, namely whether after entering the sea Miller changed his mind about suicide and did his best to stay afloat.

This in turn would lead to the speculation as to how long Miller, who was 36 years of age, could stay afloat, and whether he could and would stay afloat long enough for the ship to have reached him. Speculation on this issue in turn depended, at least in some measure, upon yet further speculation as to when Miller left the ship; for it would appear necessary to surmise such a moment in order to establish a causal relationship between the alleged negligent conduct of the defendant and the resulting death of Miller. Thus, if Miller had left the ship at 11:30 P. M. it would have taken the ship at least eleven hours to reach Miller after the discovery of his absence. That is, Miller would have had to stay afloat for twenty-two hours before

he could be rescued. Indeed the speculation probably went further in view of plaintiffs' claim that the African Glade should have kept on through the darkness until it had reached the point where she was when Miller was last seen at 11:30 P. M. and she should have stayed there until daylight and then combed the area in concentric circles for several hours.

Thus a series of speculations must all be indulged in and resolved in favor of the plaintiff in order to find any basis for saying that Miller could possibly have stayed afloat and alive long enough to be picked up. Each of these speculations must also reach a result which is contrary to the overwhelming probabilities. We do not see how the District Court could permit to stand such a jury finding in view of the fact that the plaintiff has the burden of proof. We do not believe that the Jones Act was meant to make ships the absolute insurers of the lives of their crew members who are lost at sea.

There was no proof of any probative facts to indicate when, where or how Miller left the ship. There is no fact from which it could be argued that Miller desired to stay alive. In a case which was tried on the theory that Miller was in a suicidal state of mind and where all the facts seem to bear this out, it is difficult to justify a verdict which must be based in part on the speculation that he changed his mind

Schulz v. *Pennsylvania Railroad Co.*, 350 U. S. 523 (1956) we believe supports the defendant's position. Schulz, a capable and experienced workman who had been in Pennsylvania's employ for several years, was assigned to night work on four tug boats docked side by side. It was Christmas night and as the company did not have enough workers Schulz had to take care of all four tugs by himself. Three of the tugs were wholly unlighted and dark. In 10 degrees above zero temperature there was some ice on the tugs and Schulz had to go from one tug to the other by flashlight. He was last seen at 7 P. M. and an inspector found him miss-

ing at 1:25 A. M. Several weeks later Schulz' body was found in the water nearby, clothed only in shorts and socks and with a flashlight in his hand. It was conceded that he was not under the influence of alcohol when he reported for work, that he did not commit suicide, that there was no foul play and that he met his death by accident. *Ib.*, p. 525. In reversing our affirmance of the trial court's direction of a verdict for the defendant, Justice Black wrote at page 526:

> "Fair minded men could certainly find from the foregoing facts that the defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. * * * Fact finding does not require mathematical certainty, (footnoting Lavender v. Kurn, 327 U. S. 645, 653). Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Schulz* there was considerable evidence from which the jury could conclude that Schulz met his death, at least in part, because of the defendant's negligence in having insufficient help to man unlighted and dark tugs which were icy in places. There were facts from which this conclusion could be drawn.

Here all the facts indicate that Miller had neither the intention to survive nor the means of survival when he disappeared from the African Glade. For Miller's alleged intentions, for his unobserved disappearance from the ship and for his apparent lack of any means to survive in the waters of the Atlantic Ocean it cannot be said that there

was any basis for concluding that the defendant was responsible in whole or in part. The jury's conclusions were not based on common sense or reasonable beliefs. *Schulz* v. *Pennsylvania Railroad Co., supra.*

The District Judge would have been justified in granting the defendant's motion for a directed verdict, either at the end of the plaintiff's case, or at the conclusion of the entire case. In any event Judge Palmieri's direction of a verdict for the defendant, even after the jury verdict, was clearly right.

Judgment affirmed.

Jury Verdict

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: Do you want me to read it, your Honor?

The Court: Yes.

The Foreman: "Miller v. Farrell Lines Company.

"First: Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

The answer is no.

"Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,

"(a) Was James W. Miller alive at that time?"

The answer is yes.

"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?"

The answer is no.

"Third: In addition to answering the above questions, please report your verdict as follows:

"'For the defendant'"—No.

"Plaintiff'"—Yes.

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller." None.

"(b) Amount, if any, awarded for the pecuniary loss to the widow." $10,000.

"(c) Amount, if any awarded for the pecuniary loss to the child." $45,000.

Appendix B

Statutes and Rules

TITLE 46 U. S. C. § 688

"§ 688. *Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States, conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

TITLE 45 U. S. C. § 52

"§ 52. *Carriers in Territories or other possessions of United States*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 2, 35 Stat. 65." (Italics ours.)

Federal Rules of Civil Procedure

"RULE 50. MOTION FOR A DIRECTED VERDICT.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the

court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

"Rule 49. Special Verdicts and Interrogatories. * * *

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return

the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

United States Constitution

AMENDMENT VII—CIVIL TRIALS

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 607.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

DANIEL FLYNN,
26 Broadway,
New York 4, New York,
Attorney for Respondent.

STAPLETON, FLYNN & LILLY,
GEORGE W. SULLIVAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 607.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement of the Case.

This is submitted in opposition tc a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York, directing a verdict for the respondent after a jury verdict was returned in favor of petitioner.

This action was brought to recover damages for the death of James W. Miller on November 14, 1950, while employed as an Assistant Electrician aboard the SS. *African*

References:

The stenographic transcript of the testimony—"(T.).)"

Glade, owned by the respondent. The complaint, although it set up only one cause of action, actually contained what will be referred to as two separate counts:

1. A violation of the duty to restrain or safeguard the decedent on the basis of alleged signs of mental instability which could have reasonably led the Master to believe he would do harm to himself.

2. A violation of the duty to rescue or to take proper and efficient means to do so after it was known that the decedent had gone overboard.

A motion was made by respondent for a directed verdict at the close of the petitioner's case (T. 506-536). The Court reserved decision (T. 548). This motion was renewed at the close of the whole case (T. 793-837), on which decision was also reserved (T. 837-838).

At the conclusion of his charge, the Court submitted two questions to the jury and also requested that the jury bring in a verdict for the plaintiff or the defendant.[1]

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[1] The Court: Now, Court's Exhibit 3 consists of two questions and a form of verdict.

The first question is this:

"Did Miller's conduct aboard the SS. *African Glade* between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

You will please answer that question yes or no.

The second question, which is in two parts, and which you should also answer yes or no, is as follows:

"Upon being notified that Miller had disappeared from the SS. *African Glade* at 10:20 A. M. on November 15, 1950:

"(a) Was James W. Miller alive at that time?

"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?

"Third: In addition to answering the above questions, please report your verdict as follows:

"For defendant or For plaintiff,"

and then in the event the verdict is for the plaintiff there

The jury answered the first question "No." The (a) part of the second question, as to whether the decedent was alive at 10:20 a.m. on November 15, 1950, was answered "Yes" and the (b) part, as to whether the Master had taken all proper and efficient means to effect a rescue, was answered "No." The jury gave an award of $10,000 to the widow and $45,000 to the child.

As soon as the jury was discharged, counsel for the defendant renewed his motion for a directed verdict made at the close of the petitioner's case and at the close of the whole case.

The Court thereupon granted the motion, set aside the verdict and directed a verdict for respondent.

The petitioner, in her appeal to the Circuit Court of Appeals, abandoned the first count relating to the duty of respondent to restrain or safeguard the decedent and did not appeal from the jury's determination of this question.

This is a suicide case. Paragraph 7th of the complaint reads:

> "That on or about the 14th of November, 1950, while plaintiff's decedent (that means Miller) was lawfully on board said vessel he was caused to be washed overboard solely by reason of defendant's negligence. The defendant, its agents, servants and employees, officers and crew members were reckless, careless and negligent in failing to maintain a proper and adequate guard and watch over plaintiff's dece-

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are three subdivisions and your verdict may be divided into any one or all of those three subdivisions as you see fit.

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller.

"(b) Amount, if any, awarded for the pecuniary loss to the widow.

"(c) Amount, if any, awarded for the pecuniary loss to the child."

I hand this to the foreman of the jury and the marshals may now be sworn and the jury retire.

dent when they knew or should have known of his disturbed condition, in failing to take adequate and necessary steps to have him relieved from his duties, in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all adequate, proper and necessary steps to conduct a search for him after he went overboard, as a result of all of which he was lost at sea and died on the 14th day of November, 1950." [T. 852]

The Trial Judge in his charge, after quoting Paragraph 7th of the complaint, said:

"Let us look at the proof in the case. There is no proof that he was washed overboard, so you can forget that. There was no claim that he was not given adequate, prompt and proper medical aid and attention. But there is a claim—and the charge made by the plaintiff in this case is a charge directed very largely against Levy, the chief electrician, because the plaintiff says, in effect, 'You, Farrell Lines, through the captain, through the officers, but through Levy (and Levy is the responsible pivot upon which they base their claim), you failed to maintain a proper and adequate watch over James W. Miller when you knew or should have known of his disturbed condition.

"That is the first charge that the plaintiff has sought to prove in this case.

"What does disturbed condition mean? It means that Miller was either insane or on the periphery of being insane; that he was mentally sick. That is what they mean.

"They might have said so, but that is another way of saying so. And when they say 'You didn't maintain a proper watch over Miller because he was disturbed, and you should have known that he was disturbed,' what would be a little more concise and practical way of expressing that in this case? Well,

it is tantamount to their saying—and that is what the plaintiff in this case is urging you to find—that Miller was so disturbed that he took his own life and that the captain or responsible members of this crew knew or should have known that he was going to commit suicide.

"There is no proof of any accident. If there were proof of an accident, it would be the burden of the plaintiff to prove it and there hasn't been one word said about any accident.

"If there were an accident, the plaintiff would have to go further and show that the defendant was responsible for the accident, and there hasn't been one word of proof with respect to that.

"The whole theory of this case in behalf of the plaintiff is, 'Miller was mentally disturbed. Miller took his life because he was mentally disturbed. You should have known of it before he took his life, and because you should have known of it and didn't take adequate and proper steps, you are responsible to us in law and must pay us damages.'" [T. 853-854]

Preliminary Comment Concerning the Petition.

The petitioner in her petition ignores completely the basis upon which the Trial Court directed a verdict for the respondent with which direction of a verdict the Circuit Court of Appeals agreed. The petitioner on page 9 of her petition stated, "The Court of Appeals finds that the Master of the vessel performed an efficient rescue." This is a misstatement. Neither the Trial Court nor the Circuit Court of Appeals passed on this question. The Trial Court, in granting the motion for a directed verdict, said:

> "I feel that there is no proper basis for the establishment of any causal relationship between the alleged negligent search and the death of the decedent." [T. 899]

The Circuit Court of Appeals said:

> "Immediately after the verdict, Judge Palmieri granted the defendant's motion for a directed verdict on the ground that there was no proper basis for the establishment of any causal relationship between the alleged negligent search and Miller's death. We agree."

ARGUMENT.

POINT I.

There is no probative evidence in the case to establish any causal relation between the alleged violation of the duty to take proper and efficient means to effect a rescue and the death of the decedent.

It is undisputed that there was no duty to rescue prior to 10:20 a. m. on November 15, 1950, at which time the Master was notified of the disappearance of the decedent. The Trial Judge in his charge regarding the search had this to say:

> "Let us get to the adequacy of the search because that is the second basis upon which the plaintiff claims that she is entitled to collect from the Farrell Lines in damages, and here again I don't want to repeat it, but it is so important: She has the burden of proving by a fair preponderance of the evidence that the defendant failed to take all of the adequate, proper and necessary steps to search for Miller after his disappearance. She also has the burden of proving by a fair preponderance of the evidence that because of the inadequacy or impropriety of that search Miller died.
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> "The normal rule is that proper and efficient means should be taken to effect a rescue of a seaman who has fallen overboard. It is pretty clear from

this case that no one on the vessel knew that Miller had left the ship until the morning of November 15th, and only after the vessel had been carefully searched —I believe that was at 10:20—when the ship was turned around, put on a reverse course, was a sea search undertaken.

"A great deal of time has been spent in this case on the question of whether or not the ship was properly handled from this time forward. Here again there is a very serious question of causal relationship between the alleged failure on the part of the master and crew to conduct a proper and adequate search and the disappearance or death of Miller.

"You have to decide which of the expert testimony you wish to believe as to whether or not a proper and adequate search was conducted. But you also have to be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence that this search, even assuming that it was inadequate, was the proximate cause in whole or in part of the death at sea of James W. Miller.

"In other words, ladies and gentlemen, if you believe—and you are entitled to believe it from the evidence in this case—that Miller committed suicide by jumping from the railing of the main deck during the night of November 14th to 15th, and that he was already dead at the time the ship was turned around, then the plaintiff cannot prove that part of case, because if he was already dead at the time the defendant undertook its sea search, it didn't make any difference what kind of a search they conducted. Since he was already dead their search could not have saved him. The search would have been subsequent to the death and could not have been the cause of the death.

"So that if you believe that Miller was dead at that time, when they turned the ship around and started the search, it makes no difference how they

conducted the search because they couldn't have saved Miller in any event. *It has to be the proximate* cause of the disappearance or death. It is not the proximate cause of the disappearance or death if Miller was already dead because the search was subsequent to it.

"I hope I have made that clear because it is an extremely important consideration in this case. In other words, to put it differently, you have got to be satisfied that Miller was alive at the time the defendant's responsible employees knew of the disappearance and undertook the search; that the search was inadequate and improper and that there was a direct causal relationship between the inadequate search and the disappearance or death of Miller." [T. 872-875]

The attorney for petitioner took no exception to this portion of the charge nor, in consenting to the questions put to the jury, did he raise any question as to the time being stated as 10:20 a. m., when the rescue should have been started.

It is also undisputed that the decedent was last seen alive at 11:30 p. m. on November 14, 1950, pacing the deck adjacent to No. 4 hatch.

There was no testimony adduced to show that Miller was alive at 10:20 a. m. on November 15, 1950. There was no evidentiary basis upon which the jury could draw an inference that Miller was alive at 10:20 a. m. The Court, in its charge, told the jury that they could not find for the petitioner for failure to make proper rescue efforts unless they first concluded that Miller was alive at 10:20 a. m. on November 15, 1950.

We have the period of time from 11:30 the night before, until 10:20 a. m. at some moment of which Miller left the ship. It is quite probable that it was prior to 6:00 a. m., when daylight set in and at which time men who were up and around would have seen him. Whether it was shortly

after 11:30 p. m. or shortly before 6:00 a. m., how can anyone with reason say that Miller was alive at 10:20 a. m.

It must constantly be borne in mind that petitioner had the burden of proving that the decedent was alive at 10:20 a. m. and that respondent had no responsibility as to rescue until that time. The record is completely barren of any evidence that Miller was alive at that time. The overwhelming probability is that he was dead hours before the time when respondent was obligated to commence rescue efforts.

In order to find that Miller was alive at 10:20 a. m., the jury had to indulge in the following series of speculations:

(1) That Miller changed his mind about committing suicide after entering the water.

(2) That, if Miller left the ship where he was last seen, a distance of 20 or 25 feet to the water, aft of midship, he was not drawn into the propeller.

(3) That Miller was able to swim—since no evidence was given that he could swim.

(4) That Miller was able to stay afloat for 22 hours or possibly another 12, depending on the time he went overboard, or at least five hours, if it be surmised that he went overboard shortly before daylight.

If we are allowed to speculate, the only reasonable conclusion we can come to is that Miller was dead at 10:20 a. m. It cannot be said, with reason, that Miller was alive at that time and that he died subsequently because of improper rescue efforts. Such a conclusion does violence to our reason and common sense. There is utterly no basis on the evidence, with reason or common sense, that the rescue efforts contributed in whole or in part to the decedent's death.

We are dealing with a very fundamental concept—that no man can be held responsible for his negligence unless it caused the injury. In 33 Harvard Law Review in an article by Professor Joseph H. Beale, entitled, "The Proximate Consequences of An Act," he writes at page 637:

> "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law—and, it is believed, in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.
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> "Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina* v. *Dalloway*, it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.

"This principle is illustrated by several recent cases. In *Piqua* v. *Morris*, the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford* v. *Trident Fisheries Co.* where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved."

In *Hutchinson* v. *Dickie*, 162 F. 2d 103, the decedent fell from a cabin cruiser while on a pleasure cruise on Lake Erie. It does not appear how the decedent came to fall into the water. The Court below found that the owner of the yacht was negligent in backing the boat instead of turning her about. The Court of Appeals reversed and said in part:

"Further, we think an unsurmountable objection to the judgment in appellee's favor is the entire lack of evidence that anything appellant did or left undone caused his efforts at rescue to fail. It does not appear that if appellant had turned the cruiser instead of backing it, Dickie would or should have been saved. *Ford* v. *Trident Fisheries Co.*, 232 Mass. 400, 402, 122 N. E. 389."

In *Lavender* v. *Kurn*, 237 U. S. 645, 90 L. ed. 916, the Supreme Court said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-

> minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This quotation appears in petitioner's brief. This quotation, instead of supporting petitioner's contention, is authority for the proposition that where there is a complete absence of probative facts to support the conclusion reached, the verdict cannot stand and that there must be an evidentiary basis for the jury's verdict. In the case at bar there is no evidentiary basis whatsoever from which an inference can be drawn that Miller was alive at 10:20 a. m. on November 15, 1950.

In *Schulz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, the decedent, who was employed as a tug fireman, was assigned to work on four tugboats, docked side by side at Pier "H", Jersey City. Three of the tugboats were unlighted and one was partially illuminated by spotlights from the pier. The Court below directed the verdict for defendant on the ground that the decedent might have fallen on a spot where there might have been no ice or that he might have fallen from the one boat that was partially illuminated by shore lights. The Supreme Court held that reasonable men could find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand, that

he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. The opinion of the Court reads in part as follows:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and under-manned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable'. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.
>
> "We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

In the language quoted, this Court held that the conclusions must be grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be drawn. The difficulty of apply-

ing the *Schulz* case to the case at bar arises in that in the *Schulz* case there was evidence of negligence from which an inference could be drawn, that the decedent fell from one of the unlighted tugs. There is no evidence in this case from which an inference can be drawn that Miller was alive at 10:20 a. m. on November 15, 1950. There is also one other distinction between the *Schulz* case and the case at bar in that in the *Schulz* case it was conceded that Schulz met with an accident and did not commit suicide, whereas in the case at bar, the case was tried on the theory that the plaintiff did commit suicide and the possibility of an accident was excluded.

In *Johnson* v. *New York, N. H. & H. R. Co.*, 194 F. 2d 194, the decedent had been employed on the defendant's tug as a floatman. He met his death by drowning while the tug was removing two carfloats from a yard on the East River. There was no eyewitness to the accident and it was not known that the decedent had drowned until after the tug had completed its maneuver. There were two questions raised on the appeal.

1. Whether there was adequate proof of the defendant's negligence and

2. Whether, if negligence was proved, there was proof that such negligence caused the decedent's death. The opinion of the Court of Appeals reads in part as follows:

> "Even on the assumption that the custom existed and was violated, the judgment can be supported only if the evidence justified a finding that the violation had a causal relation to Johnson's death. When last seen alive he was walking toward the bow of float 53. It is a legitimate inference that he went ashore, crossed over to the 58 and had at least loosed the short rack line since the float was pulled out without

breaking it. To get into the water he must either have fallen or jumped. Conceivably after loosening the line he may have attempted to jump to the apron of Bridge 12 in order to remain ashore until the tug should return. Capt. DeMars testified that it is not unusual on such a short maneuver for a floatman, when he lets his line go, to jump ashore. However, since Johnson's duty was to remain aboard and tie together the bows of the floats, we think it a more reasonable inference that he accidentally fell from the 58. But what caused him to fall seems to us wholly conjectural. The plaintiff argues that the jury could infer that while he was loosening the rack line, the tug started to pull the float out before he expected, causing him to lose his footing and strike his forehead in some way that knocked him unconscious and threw him overboard. But the supposition that the tug started pulling out the float before he expected, presupposes that he did not shout the signal 'all gone.' The appellee argues that a bridgeman may have shouted 'all gone' when he released one of the long rack lines, but no witness observed any bridgeman in the neighborhood. It was Johnson's duty, not the duty of a bridgeman, to give the signal when the short rack line was free, and the assumption that some one other than Johnson gave it at that precise moment seems to us pure conjecture. It is at least equally reasonable to infer that Johnson did give the signal for the tug to start and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious. The record is a complete blank as to how or why he fell overboard. It is of course true that not always must a jury's verdict fall if it involves speculation and conjecture. As stated in Lavender *v.* Kurn, 327 U. S. 645, at page 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, when 'the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose

duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' In the case at bar we think there was a complete absence of probative facts to support the conclusion that Captain O'Brien's failure to send a man to see where Johnson was when the 'all gone' signal was heard caused his death. On the issue of causation the plaintiff had the burden of proof. In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed."

This case was appealed to this Court on a technical ground, sent back for a new trial. On a second trial, the jury again brought in a verdict, which was set aside by the court. The Court said, in its opinion, (*Johnson* v. *Palmer*, 129 F. Supp. 202, affirmed 220 Fed. 2d 279 on the opinion of the Court below):

"In reversing the judgment and verdict in the first trial, the Court of Appeals was of the opinion that the lack of any probative facts as to how or why Johnson fell overboard required the conclusion that the plaintiff had failed to sustain the burden of proof on the essential issue of causation. No facts were presented in this trial which would serve to remedy this lack of evidence. There is testimony that there was oil on the deck of Carfloat No. 53 near the stern. This seems to be the basis in fact for plaintiff's contention that the defendant failed to furnish the plaintiff's intestate with a safe place to work. Of course, the contention that Johnson might have slipped on this oil and fallen into the water cannot be tied in with the plaintiff's theory that Johnson might have fallen from the bow of Float No. 58, since the oil was on Float No. 53 and not Float No. 58. Furthermore, the evidence shows that Captain O'Brien saw Johnson walking forward on

> Float No. 53 towards the bow about half the length of the float on his way to release the short rack lines. Thus he was seen on the float beyond the place where the oil was found. In addition there is testimony by Gaglio and O'Brien, uncontradicted, that Johnson never got into the oil as he was walking forward toward the bow of Float No. 53."

This Court denied a writ of certiorari in this case on June 6, 1955. It may also be noted that the writ of certiorari was granted in the *Schulz* case on November 7, 1955 by the same Court. In the *Johnson* case, it was attempted to be proven by testimony that there was oil on the deck of *Carfloat No. 53,* which the Court held could not be tied in with the plaintiff's theory that the decedent had fallen from the bow of *Carfloat No. 58.* The Court also stated that the evidence showed that the decedent was seen walking forward on the carfloat beyond the place where the oil was found.

In the case at bar there was no evidence that, if Miller had gone over the side at 11:30 p. m., that he would have been alive at 10:30 a. m. and moreover, no testimony was offered by the petitioner. On the contrary, on the cross examination of Captain Feinne, petitioner's expert, the following question and answer were given:

> "Q. Captain, there is no possibility whatsoever that Miller could have been afloat from 11:30 the night before until that time, is there? A. I don't know. I don't know and you don't know either. Nobody knows" (T. 427).

The petitioner relies on the case of *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U. S. 500 to support the proposition that the alleged negligent search played a part in the death of petitioner's decedent, and quoted as follows from the opinion:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part* at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part to its negligence.'" (Emphasis added.)

It is respondent's contention that the alleged negligent search did not play "any part, *even the slightest*" in causing the death of decedent, and that his death was not caused "'in whole or *in part* to its negligence.'"

We think this case comes within the class "where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the injury" (*Rogers* v. *Missouri Pacific R. R. Co., supra*, at page 501).

In holding that the petitioner did not introduce evidence of any probative facts to show that the respondent's negligence played any part in Miller's loss of life, the Circuit Court of Appeals cited *Rogers* v. *Missouri Pacific R. R. Co., supra*, as authority for the proposition that "it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought."

POINT II.

All reasonable, proper and efficient means were used to effect a rescue after it was known that the decedent had disappeared.

The Trial Court, in granting the motion for a directed verdict, did so on the basis of lack of causal relationship between the alleged negligent search and the death of decedent. The Court did not pass on the question as to whether the evidence was sufficient to justify the jury's finding that the search was negligent. Although the question was raised in respondent's brief in the Circuit Court of Appeals, it was not passed upon.

The facts as to the search are not in dispute. The only factual testimony was given by respondent's witnesses. The testimony offered by the petitioner was that of an expert, Captain Feinne. The crux of his testimony was that the Master should have returned to the position where Miller was last known to be alive (T. 349). This was petitioner's basis for the contention that the search was negligent. We consider this proposition untenable and that we can prove scientifically that this is so.

As soon as the Master was advised at 10:20 a. m. on November 15th that Miller had disappeared, he immediately questioned those who would have reason to know about it and also ordered an immediate search by department heads of the vessel. This was done by each department head with searching parties from his department (T. 77-79, 89). At 10:30 a. m. he turned the ship about by making a 270° turn and headed the bow of his ship back into the wake from which the stern had just emerged and put her on a gyro course of 298° which was the reciprocal of the gyro course of 118° which the ship had been steering. The ship had been on a gyro course of 118° from noon on November 14th, the day

before (T. 79-81, 89, 107). Lookouts were posted about the ship. The Master communicated by radio telephone with the United States Coast Guard *Weather Ship E* which was in the vicinity. He also radioed the office of the company in New York. The search was continued until 5:16 p. m. when darkness set in and the ship then resumed her course of 118° by gyro (T. 79, 87, 111).

These were the facts as testified to by the Master, Captain Arthur T. Wilder, and by the Navigator, Captain Robert J. Ware. The testimony of Captain Wilder was taken by deposition by the defendant and read into the record by the plaintiff as part of her case. Captain Wilder at the time of the trial was employed as a pilot by the United States Government on the Panama Canal and arrangements could not be made for his attendance at the trial. Captain Ware, who had not been employed by the defendant for more than two years, testified on behalf of the defendant. No factual testimony was offered by the plaintiff. The entire case of plaintiff, as to the rescue, was based on the testimony of plaintiff's expert, Captain Theodore I. Feinne.

The plaintiff's case is based upon an answer to a hypothetical question by Captain Feinne that, in his opinion, the Master did not make a competent and efficient search. The claims of negligence appear to be:

(A) That the Master had not reversed course on a reciprocal course but had reversed course on a parallel course and was twelve to thirteen miles south of a reciprocal course;

(B) That the ship never returned to its position at the time when the man was last known to be alive aboard the vessel;

(C) That he did not get a fix at 10:20 a. m. or a couple of minutes later on November 15th;

(D) That the Master did not take into account wind or set of the current;

(E) That the Master should not have given up the search when darkness set in at 5:16, but should have remained in the area until daylight and resumed the search;

(F) That the master could have used swivel lights that might have shown out 25 to 100 feet on the water;

(G) That the Master only communicated with the U. S. Coast Guard Weather Ship once and did not radio other vessels;

(H) That the Master did not interview every member of the crew and every one of the passengers;

(I) That the Master did not request any instructions from his home office as to how to proceed.

The answers to (A), (B), (C) and (D) have to do with the method of search and will be discussed together.

The vessel had taken leave from Ambrose on November 10th on a course of 106° true by gyro. This course was changed on Tuesday morning, November 13th, at 6:30 to 112° true by gyro. On November 14th at noon the course was again changed to 118° true by gyro, which was the course the vessel was on at 10:20 a. m. on November 15th [115a, 116a].

Upon being notified of Miller's disappearance, the Master turned the vessel about by making a 270° turn, and headed the bow back into the wake from which the stern had immediately come out of. He put the vessel on a course of 298° which was the reciprocal of the course of 118° which the vessel had been on from noon of the day before. The testimony of Captain Wilder is clear that he did not make a "U" turn, but that he did get back on a reciprocal course. The testimony of Captain Ware, who was the Navigator,

is even more specific. He not only testified that the vessel made a 270° turn, but that the bow of the ship headed into its wake and that he was able to see the wake. This was reiterated throughout the direct testimony of Captain Ware and also on cross examination. This testimony is uncontradicted.

The issue as raised by the testimony of plaintiff's expert, Captain Feinne, may best be illustrated by the chart which he prepared and which was introduced as Petitioner's (plaintiff's) Exhibit No. 34. A copy of this chart is appended to this brief. [Ap. 2a]

On this chart, Captain Feinne plotted the course which the vessel was on just prior to Noon, November 14th, which was 112° by gyro, which he designated as (1) on the chart. He then charted the position of the ship as given in the log as of Noon, November 14th, when the course was changed to 118° by gyro, which he designated as (2). He next plotted the approximate position of the vessel at 11:30 p. m., November 14th, when Miller was last seen as designated (3). He next charted the position of the vessel at 10:20 a. m. on November 15th, designating it (4). He did this by taking the Noon position in the log book as of Noon, November 15th, designated (5) and running it back to 10:20 a. m. He next plotted the position of the vessel at 5:16 p. m. on November 15th which he designated (6). He also set forth the position of the Coast Guard Weather Ship E, which he designated (7). He then appended a note to the chart (8) in which he said:

> "NOTE. All data shown on this chart taken from log book of SS. *African Glade*—from pos. fixes Noon November 14-Nov. 15. Vessel was making a course of 120° true. Vessel was being set to south. Official current chart for Nov. for this area shows this south set."

Captain Feinne further stated that although the vessel was steering 118° by gyro, it was making good over the land 120° true (T. 460, 461).

He further stated that the vessel, when she was turned around at 10:20 a. m. on November 15th, was on a parallel course and not on a reciprocal course and that instead of a reverse course of 298°, it should have been 300°, and that the vessel should have returned to the point on the earth's surface where Miller was last known to be alive. In this, the petitioner's expert committed grievous error. This can be proved by an analysis of the expert's own chart, Petitioner's (plaintiff's) Exhibit No. 34.

The vessel which had been on a 118° course by gyro from Noon on November 14th, was being set to the south. This is from Captain Feinne's note (8) on his chart, Petitioner's (plaintiff's) Exhibit No. 34. When Miller left the vessel at 11:30 or subsequently, he did not remain in the same spot but was also set to the south by the current, the same as the ship. Current is movement of the water and everything in the water moves with it. Although the vessel was steaming away from Miller when he left the ship, the relative positions of the ship and Miller remained the same. When the ship took a reverse course of 298° and headed back into her own wake, she was affected by the same southerly set going out as she had coming back. Likewise, if Miller was afloat, he was being set further to the south to the same degree.

The contention that the vessel should have gone back to the geographical point where the ship was when Miller was last seen at 11:30 p. m., November 14th, is patently erroneous. It is clear that to have reached that point the ship would have had to steer 302° instead of 300° as suggested by Captain Feinne in order to account for the set to the south going back. In the meantime, Miller would have been

carried southerly another two degrees, assuming that Captain Feinne was correct in his opinion that, although the vessel had been steering 118° by gyro, it had been making 120° good over the ground.

The testimony of the Master, Captain Wilder, and Captain Ware, the Navigator, and of Captain Thomas I. Sheridan and Captain Charles E. Umstead, the two experts who testified for the defendant, was that the ship should not have returned to the point on the earth's surface where the decedent was last known to be alive. This was based on their opinion that, when he went overboard, if he remained afloat, he did not remain in the same geographical position, but was affected by the wind, set and current to the same extent as the vessel. The opinion was that only by the ship going back in its wake would there be any possibility of coming upon the decedent, if he were still afloat.

It was repeatedly asserted by Captain Ware and by Captain Sheridan and Captain Umstead, that it made no difference geographically where the decedent went overboard or where the vessel was at 10:20 a. m., but that the important thing was the relative positions of the decedent, if he were still afloat, and the vessel. Captain Sheridan, defendant's expert, testified that current was the movement of the water and that with the wind and the set, the whole water moved carrying both the ship and the man and that the relative positions of the two did not change.

The experts for the defendant testified that not only was the method of search used by the Master of the vessel correct but it was the only possible means he could have used and that to have taken a course back to the geographical position or the latitude and longitude where the man was last seen would have been an improper method of search. The plaintiff's witness, Captain Feinne, did admit

that the vessel and the man would have been affected to the same extent by the wind and the current. He also admitted that, if the vessel had headed back into her wake, the ship would have been on a reciprocal course, then he became confused, but he said that couldn't have been so, although Captain Ware specifically testified that he had seen the wake and that the bow of the ship had headed into it. Captain Feinne testified that the ship could not have headed into her wake because he contended that the course made good over the ground from noon to 10:20 a. m. was 120° true, although the vessel had been steering 118° true by gyro. The expert for the defendant as well as Captain Ware contended that the course made good over the ground made no difference for the reason that, in reversing the course, the same conditions of wind and set would have affected the vessel on a reverse course as it would on her course coming down. They testified that they did not know if the ship had been making a true course over the ground at 120° and it didn't make any difference. Captain Feinne persisted in his error and contended that in going back, the ship should have been put on a course of 300° instead of 298° to offset what he contended was the difference between the steering course of 118° and the 120° made good over the ground.

The contention of Captain Feinne was that the vessel should have gone back to the geographical point where the decedent was last seen and then commence a search. He also contended that the Master should have steered a course back of 300°, which, in his opinion, would have been the course made good over the ground on the bottom of the ocean. This Court would seem to be able to take judicial notice of the fact that at 11:30 p. m. or whatever subsequent time the decedent went overboard, the decedent did not remain in the geographical position where he went over-

board, but was deflected by wind and current as was likewise the vessel to the same extent.

Even if it be assumed that the contention by Captain Feinne, plaintiff's expert, that the ship should have taken a reverse course of 300° and gone back to the point on the earth's surface where the decedent was last known to be alive, there is an insurmountable objection to his contention. Captain Feinne testified that the vessel, from noon the day before, had been making a course good over the ground of 120° true, although it had been steering 118° true. This testimony was based entirely on the positions given in the log book for noon, November 14th, and for noon, November 15th. Captain Feinne repeatedly referred to these positions as fixes. There is no evidence that these positions were other than dead reckoning positions. The evidence in the case is that the vessel took leave from Ambrose on a gyro course of 106°, which was changed to 112° on Tuesday and changed at noon on November 14th to 118° true by gyro. The logbook shows that from the time the vessel left New York, it was partly cloudy and overcast. There was nothing to indicate that the vessel's position was ascertained at any time by fixes. The probability is that the ship was proceeding by dead reckoning from the time she left New York. On the basis of dead reckoning, the ship's position at any time shown in the log would be the course times the speed of the vessel. On this basis, no allowances would be made for wind, current or set or errors in steering. These errors could only have been corrected if at any time an opportunity had been offered to take a fix by observation of celestial bodies. The testimony of Captain Ware is that he does not recall that he was able to take any fixes on November 13th, 14th or 15th (T. 640-642).

As to (H) there was no reason why the Master should have interviewed every one aboard the vessel. The only persons who had any knowledge regarding Miller were interviewed. The only facts regarding Miller were given by Levy and Aiken and nothing further developed at any subsequent time. When the Master had all department heads search the vessel, it must be assumed that the head of each department asked the men in his department if anyone had seen Miller. This was necessarily so when they were taking part in the search. It is only reasonable to assume that, if anyone had any information, he would have come forward. The Master of the vessel properly directed the search instead of taking the time to interview all persons aboard.

As to (G) the Master communicated with the U. S. Coast Guard Weather Ship by radio telephone and not by telegram as stated in petitioner's brief. (Radio telephone was used not telegraph (T. 96)). Captain Feinne agreed that the Coast Guard would relay the message to all ships and that this would be the best way because the Coast Guard vessel had more frequencies (T. 421-424) (T. 737-738).

As to (I) the answer is that, although he advised the home office of the disappearance no instructions were given as obviously the responsible officials in New York felt that it should be handled by the Captain who was at the scene (T. 737).

As to (F) the use of lights showing only 25 to 100 feet would make it almost an impossibility to pick up a man in the water and would also blind the lookouts so that it would be impossible to see. Anyone who is familiar with night vision can realize that it would be easier to pick up a man at sea without lights than with lights (T. 727).

As to (E) if the vessel had remained in the area until daylight the next morning, the decedent, if he were alive, would have been in the water a minimum of 24 hours as it

was reasonable to believe that he had gone overboard before daylight the day before. Furthermore, he would have drifted further with the current or set and it would have been impossible to have followed any course which would have reasonably come upon the decedent. The experts for the respondent, Captain Sheridan and Captain Umstead, testified that, in their opinion, it would have been useless to have continued the search. Even Captain Feinne, on cross examination, admitted that it would have been ridiculous to continue the search (T. 440) after nightfall on November 15, 1950.

To summarize, the Master, in turning his ship about and steaming back into its wake, did the only thing he could do. To have followed any other method of search would have been wrong. Going back into his wake, as he did, was the only means by which he could possibly hope to come upon Miller, if he were still afloat. This use of the sole and only method of search cannot be held to constitute negligence.

That the Master did not interview all 57 persons aboard the ship or request instructions from his home office did not constitute negligence. The first procedure would have consumed valuable time which should be devoted to a search as was done herein. To have requested instructions from the home office would have been an attempt to shift the responsibility and control of the situation to a person thousands of miles away. The Master is in control at a time such as this and must remain in control in order to carry out such an operation as effectively and efficiently as possible. The Master's radio-telephone conversations with the Coast Gaurd Weather Ship was agreed to by the petitioner's expert as a correct procedure and was confirmed as a correct procedure by the Court below in its decision. To have attempted to search after dark using

swivel lights, or to have stayed in the area until daylight on November 16, 1950, and then continued the search would have been futile as hereinbefore indicated.

The Master of the SS. *African Glade* did everything that a reasonable, prudent man should have done in the circumstances and nothing that he did or left undone caused or contributed, in the slightest degree, to the death of James W. Miller.

Conclusion.

There are no special, important or compelling reasons set forth in the petition for the court to grant certiorari in this case.

Respectfully submitted,

DANIEL FLYNN,
Attorney for Respondent.

STAPLETON, FLYNN & LILLY,
GEORGE W. SULLIVAN,
Of Counsel.

Dated: New York, New York,
December 5, 1957.

Petitioner's (plaintiff's) Exhibit No. 34.

Chart.

(Opposite ☞)

Note

The Petitioner's exhibit No. 34 (Navy Hydrographic Office Chart No. 5244) will not reproduce legibly, therefore we do not include it in toto. A small portion containing remarks and positions, however, is "blown up" in the next frame.

2800 2880 2980 2880 2000 1600

2852 2831 2700

3000 3032 2750

3077 3151

2758 2917 2768 (7)

2851 2700

2753

2000

2854 2732

2777 2750

2793 2875

2850

(6)

112° T.

APPROX 150 MILES

118° T.

248° T.

112° T.

2600

Last Page Rec'd Noon Nov. 14

(8)

Pos. Noon Nov. 14 C.C. To 118°

(4)

Variation increasing 2' annually

11:30 P.M. Nov. 14 Approx Pos 17 Miles Man was Last seen

(3)

Ship Approx Pos. 10:20 A.M. - Nov 15 C.C. To 248° T

(2)

Pos. by Observation Noon Nov 15

(5)

Approx Pos. 4:45 P.M. Nov. 15 When Search was Abandoned - Approx 42 Miles away from area man was last seen aboard.

(1)

NOTE. ALL DATA SHOWN ON THIS CHART TAKEN FROM LOG BOOK OF S.S. AFRICAN GLADE - FROM POS. FIXES NOON NOV 14 - NOON NOV 15. VESSEL WAS MAKING A COURSE OF 120° TRUE VESSEL WAS BLOWN ERT TO SOUTH. OFFICIAL CURRENT CHART FOR NOV. FOR THIS AREA - SHOWS THIS SOUTH SET